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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
*Petitioner,*

v.

BOSTON SCHOOL COMMITTEE, ET AL.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTION PRESENTED

Is a judicial order in a school desegregation case, directing that senior white teachers shall be laid off rather than junior black teachers, and black teachers recruited rather than white teachers recalled, equitable and constitutional, although the court found neither that the particular mathematical ratio of black teachers to white teachers that is to be maintained thereby is necessary to desegregate the schools, nor that the advantaged black teachers and applicants have been the victims of prior employment discrimination?

## PARTIES TO PROCEEDING BELOW

The parties in the United States Court of Appeals for the First Circuit were: (a) plaintiffs—Tallulah Morgan, et al. as representatives of the class of plaintiffs that includes black public school students and their parents; (b) four defendants—the Boston School Committee, the City of Boston, the Massachusettts Board of Education, and the Massachusetts Commissioner of Education; and (c) four intervenors—petitioner Boston Teachers Union, the Boston Association of School Administrators and Supervisors *, the Concerned Black Educators of Boston and El comite de Padres.

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* The Boston Association of School Administrators and Supervisors has filed a separate petition for a writ of certiorari.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Local 66, Boston Teachers Union, an affiliate of the American Federation of Teachers (AFT), AFL-CIO, petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting this Court to review the First Circuit's judgment in *Morgan, et al. v. O'Bryant, et al.* (C.A.1, Nos. 81-1561, 81-1617-1619 & 81-1646; Feb. 17, 1982).

## OPINIONS BELOW

The June 2, 1981 order of the United States District Court for the District of Massachusetts is not reported; it is set forth at pp. A-18-A-19 of the separately bound appendix to this petition (hereafter cited "App."). The

July 24, 1981 order of the district court denying petitioner's motion for reconsideration, evidentiary hearing and stay was handwritten by the district court on the face of the motion and is not reported; its text is reprinted at App. A-17a-A17. The opinion of the United States Court of Appeals for the First Circuit is reported at 671 F.2d 23 and is reprinted at App. A-1-A-16.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the First Circuit were issued on February 17, 1982. (App. A-1, A-29-A30.) On April 23, 1982, Mr. Justice Brennan signed an order extending the time for filing a petition for writ of certiorari to and including June 17, 1982. (App. A-30.) This petition for a writ of certiorari is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause to the Fifth Amendment of the United States Constitution:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

### A. The Original Finding That Respondent Boston Public School Authorities Maintained a Racially Segregated School System.

This petition arises out of and is part of an action by black parents and their children who attend the Boston public schools to desegregate those schools. That action was brought in 1972 pursuant to 42 U.S.C. §§ 1931, 1983, 2000d & 28 U.S.C. § 1343. The original defendants were the Boston School Committee (the statutory governing authority of the schools), its individual members, the Superintendent of the Boston Public

Schools, the Board of Education of Massachusetts, its individual members, and the Massachusetts Commissioner of Education. These parties to the original action are respondents in this Court together with an organization named Concerned Black Educators of Boston ("CBEB") which intervened in the course of the litigation. Petitioner Boston Teachers Union ("BTU") intervened during the course of the litigation on the issue of relief as it affects the Boston public school teachers, of which BTU is the exclusive bargaining representative.

In June 1974, the district court determined that the Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. (*Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (C.A. 1, 1974), *cert. denied*, 421 U.S. 963 (1975).) In one portion of its extensive opinion the district court determined that the school authorities' policies with regard to the faculty and staff contributed to the dual school system and discriminated against black school children. (379 F. Supp. at 456-466.) That court described plaintiffs' claims on this subject, all of which were sustained, as follows:

> Plaintiffs' principal claim involving faculty and staff is that the defendants have knowingly pursued policies resulting in racial segregation of teachers and administrative personnel, thereby reinforcing the racial identifiability of schools and increasing the racial segregation of students. Plaintiffs' next claim under this heading * * * asserts a denial of equal educational opportunity, viz., that defendants have knowingly pursued policies resulting in less qualified, less experienced and lower paid teachers in predominantly black schools. A third claim is that defendants have violated the constitutional right of public school students to have the school system operated free of racial discrimination in the recruiting, em-

ployment and promotion of teachers and staff. [379 F. Supp. at 456.]

### B. The Original Orders Establishing a 20% Goal Of Black Teachers in the Boston Public Schools to be Achieved Through Hiring and Recruitment.

In January 1975 the district court issued a decision entitled "Memorandum and Orders on Faculty Recruiting and Hiring." (388 F. Supp. 581, 582.) That court reiterated that one "aspect" of the intentional segregation which it had found

> was the racial composition and distribution of faculty members in the school system. The court found the low percentage of black teachers to be a result of unconstitutionally discriminatory use of a cut-off score on the National Teacher Examination, inadequate minority recruitment efforts, and the reputation of Boston as an anti-black, segregated school system. [388 F. Supp. at 582; see also 379 F. Supp. at 463-466]

In its 1975 decision the district court "adopted 20%, approximately the black population of Boston, as an appropriate percentage goal for the hiring of black teaching faculty." (388 F. Supp. at 582.)[1] That court determined that "the presence of black teachers in numbers more closely proportionate to the number of black students in the schools is an important step" to eliminating racial discrimination. Accordingly, the district court directed that: "black and white teachers should be hired on a one-for-one basis until the percentage of black faculty in the schools reaches 20%." (388 F. Supp. at 583.) That court also directed "an affirmative minority recruitment program to continue until there is a 25% black faculty. (*Id.*). The remainder of its opinion de-

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[1] The court observed that the "percentage of a minority group in the city's population is the goal adopted in numerous other discrimination cases." (*Id.*, citations omitted).

tailed the recruitment and hiring steps the Boston school authorities were directed to undertake. (*Id.* at 584-586.)

On an appeal by BTU, the court of appeals affirmed. (530 F.2d 431, *cert. denied*, 426 U.S. 935.) That court too relied on the Boston population ratio as the foundation for the 20% goal. (530 F.2d at 433.) And the court of appeals took pains to demonstrate "that there is no reason to believe that the 20 percent figure was unrealistic":

> The availability of a substantial number of qualified black applicants (and the district court did not demand the hiring of anyone who was unqualified) was demonstrated by the fact that in the month following the court's first recruitment order on July 31, 1974, the percentage of black faculty was increased from 7.1 to 10.4 percent. This indicates that pessimism as to the prospects of finding qualified black teachers should not be overestimated. As the union points out, there may well be an oversupply of applicants for teaching positions in Boston. While affirmative action to rectify past discrimination is more painful during a time of underemployment than in one of full employment, that fact is no excuse for inadequate action. The goal set by the court has no deadline date. As the court recognized, it contemplates "a gradual increase in the number of black teachers over several years". The prospect of placing 500 additional black teachers in a teaching force of over 5,000 over several years does not seem to us to place an undue burden on the non-minority labor force. [530 F.2d at 434.] [2]

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[2] In 1978, the district court found that the school authorities had not complied adequately with the hiring order. The district court modified that order, requiring a 1.5% annual increase in black faculty until the 20% ratio is reached. (*Morgan v. McDonough*, unpublished Order on Faculty Recruiting and Hiring (D. Mass., July 5, 1978); Court of Appeals Appendix G.)

### C. The 1981 Order Transforming The Hiring and Recruitment Goal Into a Direction That The Boston Public School Authorities Lay Off White Teachers on the Basis of Their Race and Prefer Black Applicants to White Laid-Off Teachers.

In early 1981, the Boston public school authorities informed the district court that they contemplated dismissal of permanent teachers because of decreased funding.[3]

On February 23, 1981, the district court requested a memorandum from the parties addressing the relationship between the original hiring order, the seniority provisions of the collective bargaining agreement between BTU and the Boston School Committee,[4] and the contemplated dismissals. In its March 4, 1981 Memorandum BTU asked the District Court to preclude dismissal of tenured teachers and requested an evidentiary hearing on "the impact of teacher layoffs on the quality of education and this Court's desegregation orders" and on funding available to avoid dismissals. No evidentiary hearing was held.

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[3] There are three categories of teachers in the Boston school system—permanent, provisional and temporary substitute. (See 379 F. Supp. at 457.) One of the findings of discrimination against black school children was that a disproportionate percentage of less qualified and experienced (i.e., provisional) teachers had been assigned to the predominantly black public schools. (*Id.* at 461-463). Massachusetts teachers acquire tenure by three consecutive years of service. (Mass. G.L. c. 71, § 41.)

[4] The collective bargaining agreement effective from September 1, 1980 through August 31, 1982 establishes "job security" for tenured teachers, and states that they "shall continue to be employed" through June 30, 1982. The agreement provides for reduction in force in reverse seniority order and for recall in seniority order. Seniority is defined as "length of professional service." (Contract between the Boston Teachers Union, Local 66, AFT, AFL-CIO and the School Committee of the City of Boston, Art. IVC, §§ 16, 17; Art. IVA, § 5. App. A-31-A-35.)

In May 1981, the school committee moved the district court for an order to allow the committee to abrogate the job security and seniority provisions in its agreement with BTU to permit the dismissal of tenured senior white teachers while retaining junior black teachers. In its memorandum supporting this request, the school committee said it was necessary to eliminate between 1200 and 1600 teaching positions. The school committee said that the percentage of black teachers would be reduced from a then current 19.09% to approximately 8% if 1200 teachers were dismissed accordingly to seniority.

The district court heard argument on the school committee's request on May 27 and 28, 1981 but took no testimony or other evidence. On June 2, 1982 the district court granted the school committee's request, ordering:

> 1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%, and the systemwide percentage of other minority teachers will remain at its current level.
>
> 2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide, which the court expects will be by March 1982.
>
> 3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black. [App. A-19.]

As a result of this order, an estimated 1100 tenured white teachers have been dismissed. And BTU is informed that at least 15 new black applicants have been employed as teachers to maintain the 20% ratio while hundreds of experienced tenured white teachers remain out of work with no prospect of recall. The precise impact of the order has not been established as there is no factual record in the district court.

On July 21, 1981, BTU moved for reconsideration of the district court's order, again requesting an evidentiary hearing. BTU argued, *inter alia*, that the district court's order erroneously placed the entire burden of maintaining during significantly changed circumstances a particular ratio of black teachers on innocent white teachers in violation of their bona fide, collectively bargained seniority rights even though the black teachers who benefit thereby are not identifiable victims of employment discrimination. BTU argued also that the order would result in a less experienced, less educationally qualified teacher force to the detriment of all public school children.

The district court denied reconsideration and an evidentiary hearing without taking oral argument or receiving responses from other parties. In its handwritten order on the cover sheet of BTU's motion, the District Court stated that the "facts" necessary to its exercise of equity power "were all known or assumed in a general way". (App. A-17.)

BTU appealed to the United States Court of Appeals for the First Circuit and that court affirmed the district court order without modification. (App. A-1-A-16.)

## REASONS FOR GRANTING THE WRIT

This case presents questions of the utmost sensitivity and does so at a moment of particular urgency.

The courts below have implemented a school desegregation decree by ordering a school board that must make teacher layoffs because of financial stringencies to do so in a manner that assures that black teachers constitute 20% of the remaining teacher force. The result of this "race-conscious remedy" for pre-1975 school committee hiring discrimination is that over a thousand white teachers with tenure of up to 16 years of service have

been laid off while none of the tenured black teachers (including those with lesser service) have been laid off and at the same time new black applicants have been hired.

The long-term white teachers who carry the entire burden of accommodating to a sharply reduced school budget had no hand in crafting the unlawful pre-1975 hiring policy "remedied" by this order—they are innocent third parties to the *school committee's* violation. And neither the junior black teachers who have been retained nor the black applicants recently hired are identifiable victims of that prior school committee discrimination—indeed, the black teachers hired since 1975 are the beneficiaries of a requirement in the original court decree that a specified proportion of new hires be made on the basis of race, a requirement that provided those individuals an advantage over white applicants of the same attainments in competing for open teacher positions.

The order of the courts below mandates race preferences far exceeding any heretofore sanctioned by this Court. In both of the following respects, that order is unprecedented:

1. The courts below have decreed that senior white employees who have committed no wrong must lose their jobs in order to leave room for junior black employees and black applicants who have not themselves been the victims of employment discrimination.

2. This drastic decree has the sole objective of maintaining a percentage of black teachers equal to the black population of Boston—a result that the court of appeals determined, without a shred of corroborative record evidence, is necessary to assure that black pupils have a sufficient number of "role models" of their own race.

We show below that this order poses grave questions as to the appropriate limits of the federal courts' equitable power, and, assuming the order were held to be within that power, presents substantial unresolved questions as to the restraints imposed by the Fifth Amendment on the federal courts' power. And despite the substantial shortcomings in its rationale, the First Circuit has followed a similar approach with regard to layoffs in the Boston police and fire departments (*Boston Chapter, NAACP v. Beecher*, —— F.2d ——, 1982 BNA Daily Labor Report, No. 97-D-1-D-7 (C.A. 1; May 11, 1982)) and the Sixth Circuit has done the same with regard to the Memphis fire departments (*Stotts v. Memphis Fire Dept.*, —— F.2d ——, 28 FEP Cases 1491 (C.A. 6; May 7, 1982)).

As these decisions coming in quick succession evidence, this is a time of desperate job competition in this Nation. The unemployment rate is the highest since 1938. One person out of every ten seeking employment cannot find work. There are 178,000 fewer state and local government employees than there were a year ago. (U.S. Dept. of Labor, Bureau of Labor Statistics, *Press Release, The Employment Situation: May 1982*, U.S.D.L. 82-203 (June 4, 1982).) In short, not since the end of the great depression has a layoff been of such devastating consequence to the individual who becomes unemployed. For precisely that reason, the questions of "importance" and "human impact" (App. A-7) presented here have come to the fore. And, there is no context in which resolution of those questions is more important than that of administering the myriad of continuing school desegregation decrees issued since *Brown v. Board of Education*, 347 U.S. 483 & 349 U.S. 294.

Thus, on every count, this case is one uniquely deserving of this Court's consideration.

## I. THE DECISION BELOW IS CONTRARY TO THE APPLICABLE EQUITABLE PRINCIPLES DECLARED BY THIS COURT TO GOVERN THE FASHIONING OF RACE-CONSCIOUS REMEDIAL DECREES.

A. *Swann v. Board of Education*, 402 U.S. 1, 15-16, states the basic rule applicable here—that

> • • • a school desegregation case does not differ substantially from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

See also *Brown v. Board of Education*, 349 U.S. 294, 300 (*Brown II*); *Milliken v. Bradley*, 418 U.S. 717, 737-738 (*Milliken I*); compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-422 (stating the standards for equitable relief in Title VII of the Civil Rights Act of 1964 cases). The Court in these cases thus followed the summary of the power and the duty of a court of equity in *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

And as this Court has stressed, while choices among remedies "are, of course, left in the first instance to the district courts," such "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles." (*Albemarle, supra*, 422 U.S. at 416, quoting *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall C.J.).)

A review of the circumstances that led to the order here makes it plain that the order does not meet the threshold requirement for an equitable remedy: the courts below had no foundation for concluding that the order would serve to repair a constitutional violation.

The district court's supplemental order at issue here rests entirely on its original order adopting 20% as "an appropriate percentage goal for the hiring of black teaching facility." The supplemental order was not accompanied by any additional findings. And the original order was *not* based on a determination that the plaintiff black school children are constitutionally entitled to 20% or any other ratio of black teachers. Rather, this figure was chosen and legally justified as "approximately the black population of Boston" (388 F. Supp. at 582).[5] The court of appeals' affirmance of that order was likewise based on the Boston population figures. (530 F.2d at 432-433.)

Indeed, the district court's oral observations in issuing the supplemental order tend to undermine the proposition that adherence to the 20% goal at the expense of incumbent white school teachers is necessary to effectuate the desegregation of the Boston public school system. The district court observed that discrimination against black students in Boston schools is "very much less than what it was before" the hiring quota order was issued and concluded that "the percentage of black faculty and staff which is required for student desegregation purposes today is, if anything, less than what was needed" when the hiring ratio was established in 1975. (App. A-25-A-26.)

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[5] The district court's original order also made provision "for an affirmative minority recruitment program, to continue until there is a 25% black faculty." (388 F. Supp. at 582.) This program involved no hiring *preferences*; rather the methods of recruiting and hiring the school board was required to follow were specified. (*Id.* at 584-586.)

Aside from treating the 20% goal as a given on the basis of its earlier decisions (A-7-A-8), the court of appeals advanced two additional rationales:

> An integrated faculty and staff is also necessary to bring black students and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732, 748 (W.D. Mich. 1980), appeal pending. [A-10-A-11.]

But there is a fundamental difference between "integrating" a faculty—that is, hiring and assigning teachers in a non-discriminatory manner—and single-mindedly insisting on a fixed mathematical ratio of black teachers based on the black population of the locality. Moreover, the "role model" theory is not based on record evidence or on a supporting district court finding.

In fact, the "role model theory" had previously been expressly *rejected* by the district court when that theory was advanced by the school board as a justification for its teacher assignments. That court had said that the record in this case is "barren of evidence supporting the argument." The only testimony on the subject here—by an associate school superintendent—was concededly "a curbstone opinion unsupported by any study or empirical data." (379 F.Supp at 460-461.) And the court of appeals' reliance on the observation in *Oliver* is far from an adequate basis for indulging a questionable sociological assumption to justify a drastic judicial order.[6] Partic-

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[6] Although there is no basis for the court of appeals' role model theory, the record and findings *do* show that the order defeats the educational interests of the school children, black and white. One of the elements of segregation against which the plaintiffs successfully complained was the disproportionate assignment of *inexperienced* teachers to identifiably black schools. (See p. 6, n.3, *supra*.)

ularly is that so given the Congressional view, expressed in § 703(e)(1) of Title VII, that race should never be "a bona fide occupational qualification"—*viz.* that an employer may never justify racial discrimination on the ground that persons of one race will better serve an employment objective than persons of another race.[7]

Since the absence of a 20% black teacher complement is not a "condition that offends the Constitution" (*Swann*,

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[7] Section 703(e)(1) provides:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, * * *.

The failure to include "race" and "color" in the exception is conspicuous. It was noticed by Congressman Williams who offered an amendment to add those classifications to the provision. (EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964, at 3191.)

Congressman Celler, Chairman of the House Judiciary Committee, and floor manager of the Civil Rights Act, spoke against the amendment:

> We did not include the word "race" because we felt that race or color would not be a bona fide qualification, as would be "national origin." That was left out. It should be left out. [*Id.*]

Congressman Williams' amendment was defeated by a voice vote. (*Id.*) And the Senate accepted § 703(e) as written by the House.

In 1964, then, the sponsors of Title VII rejected the proposal that employers be permitted to make race-based employment decisions where those decisions would be "reasonably necessary to the normal operation" of their businesses. When in 1972 Title VII was made applicable to public employers, Congress "expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." (*Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14.) But so far as we have ascertained, the only accommodation Congress appears to have made in 1972 to the special needs of public employers is the exclusion of certain categories of employees from coverage under the Act (see § 701(*f*)), an exclusion that does not embrace the teachers involved in this case.

*supra*, 402 U.S. at 16), the order requiring that at all costs this ratio be reached and maintained violates the most elementary requisite of a true constitutional *remedy*. (See in particular *Milliken*, *supra*, 418 U.S. at 738.)

B. Had the court of appeals established a nexus between its remedial objective and the wrong to be remedied, that court would still have been required to assess and to balance the impact of its order on innocent third parties. In this regard its opinion says only:

> We are not unmindful of the substantial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated, but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. [App. A-14, footnote omitted].

This asserted justification for imposing the "human costs" of these layoffs on incumbent white teachers and on those teachers alone is, we submit, utterly inadequate. While the fact that a substantial number of teachers would be laid off is not due to the court orders, the choice of *who* would be laid off clearly is due to those orders; otherwise the school board would have been contractually bound under its collective bargaining agreement to lay off the most junior teachers without regard to race. The object and effect of the school board's motion that precipitated the court order at issue here was to override contractual seniority. Given the actual situation before the court of appeals, it is the order that court approved that requires that senior white teachers be laid off before junior black teachers and that new black teachers be hired before senior white teachers on layoff are recalled.

Depriving innocent employees of their jobs so that others of a different race, who are not victims of the employer's discrimination, may be employed, is un-

precedented. All of the cases cited by the court below in support of the statement that "[o]ther circuits are substantially in accord" (App. A-12) go only so far as to uphold affirmative action programs in hiring and promotion. And in *Chance v. Board of Examiners*, 534 F.2d 993, 998 (C.A. 2), the Second Circuit stated the heretofor accepted limit of lawful affirmative action relief in the following terms:

> The relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City school system. * * * To require a senior, experienced white member of such a group [of employees] to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination.[8]

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[8] In the words of a respected treatise on industrial relations, "there has been a growing belief among both managements and employees that for many purposes the long-service workers are entitled to greater security and superior benefits as a matter of equity." (Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management*, p. 104 (1960)). In recognition of that equity, as this Court recently stressed,

> Seniority provisions are of "overriding importance" in collective bargaining, *Humphrey v. Moore*, 375 U.S. 335, 346 (1964), and they "are universally included in these contracts." *Trans World Airlines, Inc. v. Hardison*, [432 U.S. 63], at 79. * * * Congress was well aware in 1964 that the overall purpose of Title VII, to eliminate discrimination in employment, inevitably would, on occasion, conflict with the policy favoring minimal supervision by courts and other governmental agencies over the substantive terms of collective bargaining agreements. *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980). Section 703(h) represents the balance Congress struck between the two policies * * *." [*American Tobacco Co.*

In *Steelworkers v. Weber*, 443 U.S. 193, 208 this Court indicated that the validity of a private-sector affirmative action program embodying racial preferences turns in part on whether the program "require[s] the discharge of white workers and their replacement with new black hires." Prior to the decision below the courts of appeals had uniformly followed *Weber's* lead concerning the need to recognize the legitimate expectations of incumbents. (See, e.g., *Setser v. Novak Inv. Co.*, 657 F.2d 962, 969 (C.A. 8, en banc) and the cases collected *id.*)

In apparent recognition of the force of the precedent contrary to its position, the court below defended the result reached here by distinguishing cases such as *Chance* as dealing with the comparative claims of white and black employees while the instant case is one which sets off "the expectations of certain teachers" against "the expectations of the plaintiff class of school children and their parents." (App. A-14.) That approach is doubly defective. First, it assumes that the plaintiffs have a legitimate expectation in the 20% black teacher ratio, although that ratio had been set as a "goal" to be achieved by hiring and recruitment, and posited that there would be no "undue burden on the nonminority labor force." (See p. 5, *supra*). Second, that court's purported distinction in no way addresses the lack of equity in the impact of the order at issue here on innocent white employees.

C. We referred at the outset to the duty of a court of equity to be "the instrument for nice adjustment and reconciliation between the public interest and private needs * * *." (*Hecht Co. v. Bowles*, *supra*, 321 U.S. at 329.) A final grave defect in the lower courts fulfillment of that obligation is their failure to give appreciable

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*v. Patterson*, —— U.S. ——, 50 L.W. 4364, 4367-4368 (April 5, 1982).]

That balance, as *Teamsters v. United States*, 431 U.S. 324 and its successors through *Patterson* show, is highly protective of seniority rights.

weight to the incumbent white teachers' interests in not losing their jobs *because of their race*. That interest is not merely "private," but implicates the strong public interest in a racially colorblind society. Effectuation of that policy must be a major concern of a court of equity, even if it should be ultimately determined that the decree under review is within the outer reaches of judicial power.

The court of appeals observed that "race-conscious" remedies are "required where colorblind approaches would be inadequate." (App. A-12 citing *Swann*, *supra*, 402 U.S. at 28 and *Green v. County School Board*, 391 U.S. 430). That proposition does not justify the order here: the district court did not make a finding that desegregation of the Boston schools could be achieved and preserved only by mandating a 20% black teacher complement. While the court of appeals' opinion may be read as so finding, its view is without evidentiary support. (See p. 13, *supra*). More fundamentally, *Swann* itself unequivocally rejected the use of rigid racial quotas as remedies for school desegregation. The *Swann* Court said:

> [The district court's opinion] contains intimations that the "norm" is a fixed mathematical racial balance reflecting the pupil constitutency of the system. If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. [402 U.S. at 23-24.]

The establishment of a "fixed mathematical ratio" of 20% black teachers in the Boston school system that applies no matter what cannot be reconciled with *Swann's* reasoning. And insistence on that racial balance regardless of the human costs is the antithesis of equity, which is "distinguished" by "[f]lexibility rather than rigidity." (*Hecht Co., v. Bowles*, *supra*, 321 U.S. at 329.)

## II. THIS CASE PRESENTS A SUBSTANTIAL QUESTION CONCERNING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF RACE-CONSCIOUS REMEDIES.

Quite apart from the failure of the court of appeals to heed basic principles of equity, the decision below raises serious constitutional questions concerning the permissible scope of race-conscious governmental action. In two respects, the result reached in this case goes far beyond any this Court has sustained as consistent with the Constitution: first, the order below results in the loss of employment for over a thousand employees solely because of their race; and second, the courts below justified that order on only the most speculative and attenuated basis.

When this Court held, in *Bolling v. Sharpe*, 347 U.S. 497, that the rule of *Brown v. Board of Education* applies against the federal government by virtue of the Due Process Clause of the Fifth Amendment, Chief Justice Warren wrote for a unanimous Court:

> Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." And in *Buchanan v. Warley*, 245 U.S. 60, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law. [347 U.S. at 499, footnotes omitted]

Subsequent experience has shown that effectuation of the constitutional rule declared in *Brown*, *Bolling* and other cases cannot be achieved entirely without providing race-conscious remedies for past violations of the nondiscrimination principle. But this Court has consistently

scrutinized such remedies with the greatest care, because of the all but irreconcilable tension between race-conscious means and the ultimate constitutional end of a color-blind society.

The sharp divisions within this Court in these cases, most notably in *University of California Regents v. Bakke*, 438 U.S. 265, and *Fullilove v. Klutznick*, 448 U.S. 448 evidences the delicacy of the issue, and the unwisdom of any dogmatic approach thereto. This much, however, is plain: The courts below failed wholly to engage in the thoughtful and particularized analysis of the propriety of a race-conscious remedy without which, as this Court has taught, both by word and example, such a remedy may not constitutionally be sustained. Moreover, the judgment under review has by far the most serious adverse impact of any race-conscious remedy or order to come before this Court. These factors in combination are, we submit, more than sufficient to raise the most serious doubt of the correctness of the lower courts' action. And in this area of central concern to the society, resolution of that doubt is uniquely this Court's function.

The district court transformed the original hiring and promotion goal into an order directing racially based layoffs without any constitutional analysis at all. The court of appeals asserted the broad generality: "Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination." (App. A-11, citing several opinions in *Fullilove* and *Bakke*, respectively.)

Those decisions undoubtedly stand for the proposition that race *may* constitutionally be taken into account in remedying prior discrimination. But the court below disregarded one additional proposition that secured the assent of the majority of this Court—*viz.* that even where it is appropriate as a remedy any form of race

preference or disability is to be precisely crafted and most carefully scrutinized.

The opinion of the Chief Justice in *Fullilove* stressed the strong deference due to any Act of Congress (448 U.S. at 480), contrasted "the limited remedial powers of a federal court * * * with the broad remedial powers of Congress" (*id.* at 485), and recognized that even Congress

> may employ racial or ethnic classifications in exercising its spending or other legislative powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal. [*Id.* at 480; see also *id.* at 486-487.]

Justice Stewart, dissenting for himself and Justice Rehnquist, stated: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." (*Id.* at 523.) And Justice Stevens declared: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." (*Id.* at 537, dissenting opinion; see also *id.* at 548.)

In citing *Bakke*, the court below seemingly overlooked the fact that the California Regents' admissions policy was ultimately rejected. Justice Powell in his decisive opinion in that case emphasized:

> The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of

> burdens hinges on ancestry or the color of a person's skin or ancestry, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. [438 U.S. at 320.]

In Justice Powell's view, as expressed in *Fullilove*, "a racial classification * * * is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest." (448 U.S. at 496, Opinion of Powell, J.)

The courts below have failed to make the finding of remedial necessity a majority of this Court has required as the minimum required to support governmental action that adversely affects any individual on the basis of race.[9]

Apart from the failure to establish remedial necessity, the courts below failed also to address, much less justify, the drastic consequences of the order at issue here: the loss of employment solely on the basis of race. In *Fullilove*, the Chief Justice observed:

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by

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[9] As noted earlier, the district court made no findings in transforming a hiring "goal" into a fixed ratio which the school committee must achieve at the cost of layoffs out of seniority. And the court of appeals' assumptions in support of that order are without evidentiary support. (See p. 13, *supra*.) The burden was clearly on the proponents of this order to create the requisite record support for such an order, if they were able to do so. Having entered an order without such a showing and without findings, the district court compounded its error by denying BTU the opportunity for a hearing to demonstrate the order's severe adverse impact and the other reasons why that order is inequitable and unconstitutional.

> innocent parties is not impermissible. * * * The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. * * * [448 U.S. at 484, citations omitted; See also *id.* at 514-515 (Powell, J. concurring).]

Two Justices would have gone even further, for they expressed the view that "Under our Constitution the government may *never* act to the detriment of a person solely because of that person's race." (448 U.S. at 525, Stewart, J. dissenting.)[10]

The present case therefore goes far beyond *Fullilove* in a respect that may well be controlling of the constitutional issue: The order here deprives over a thousand identifiable individuals of existing vested rights on the basis of race, whereas *Fullilove*, and indeed *Bakke*, involved only the loss of opportunities. If the Constitution allows the government to impose that burden on an individual on the basis of his race, for some reason other than the necessity to restore some other individual who has been the victim of employment discrimination to his "rightful place," that novel doctrine should be declared by this Court, and only after the fullest deliberation.

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[10] To be sure, Justice Stewart noted that "A court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race." (488 U.S. at 525, n.4, citing *Teamsters v. United States*, 431 U.S. 324; *Franks v. Bowman Transportation Co.*, 424 U.S. 747; *Swann, supra*, 402 U.S. 18-32). Here, however, there has been no evidence and no finding that any of the advantaged black teachers had been illegally deprived of a teaching position.

## CONCLUSION

For the above stated reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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NO._____

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IN THE

# Supreme Court of the United States

October Term, 1981

LOCAL 66, BOSTON TEACHERS UNION,
AFT, AFL-CIO,
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, et al.,
Respondents.

## APPENDIX TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# APPENDIX

Tallulah MORGAN, et al., Plaintiffs, Appellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Local 66, Boston Teachers Union, AFT, AFL-CIO, Intervenor, Appellant.

Tallulah MORGAN, et al., Plaintiffs, Apellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Boston Association of School Administrators and Supervisors, Intervenor, Appellant.

Tallulah MORGAN, et al., Plaintiffs, Appellees, v. John D. O'BRYANT, et al., Defendants, Appellees, Concerned Black Educators of Boston, Intervenor, Appellant.

(Nos. 81-1561, 81-1617 to 81-1619 and 81-1646.)

## ORDER

(United States Court of Appeals, First Circuit.)

Argued Jan. 6, 1982.

Decided Feb. 17, 1982.

Bruce A. Miller, Detroit, Mich., with whom Christopher P. Legghio, Stuart M. Israel, Miller, Cohen, Martens & Sugarman, P.C., Detroit, Mich., James T. Grady and Grady & McDonald, Boston, Mass., were on brief, for Local 66, Boston Teachers Union, AFT, AFL-CIO.

Paul F. Kelly, Boston, Mass., with whom Richard W. Coleman, and Segal, Roitman & Coleman, Boston, Mass., were on brief, for Boston Ass'n of School Adm'rs and Sup'rs, AFL-CIO.

Caroline B. Playter, Boston, Mass., with whom Doyle, Playter, Novick & Berkin, Boston, Mass., and Kenneth Kimerling, New York City, were on brief, for El Comite De Padres.

Larry J. Johnson, with whom Robert Pressman, Cambridge, was on brief, for Tallulah Morgan, et al.

Marshall Simonds, Boston, Mass., with whom Henry C. Dinger, and Goodwin, Proctor & Hoar, Boston, Mass., were on brief, for Boston School Committee.

Robert H. Blumenthal, Boston, Mass., Counsel, Dept. of Ed.,, with whom Robert H. Bohn, Jr., Sp. Asst. Atty. Gen., Boston, Mass., was on brief, for Bd. and Com'r of Ed.

John C. Somers, New York City, on brief for The A. Philip Randolph Institute, amicus curiae.

Nancy Gertner, Charles W. Rankin, and Silverglate & Gertner, Boston, Mass., on brief for Concerned Black Educators of Boston.

Before: COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

These consolidated appeals are from orders of the district court in the Boston school desegregation case. A short history may prove helpful. In 1974, the district court found that Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school system along racially segregated lines. *Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974). This court affirmed. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). The basic

remedial orders were entered in 1975 and affirmed in 1976. *Morgan v. Kerrigan*, 401 F.Supp. 216 (D.Mass. 1975), *aff'd* 530 F.2d 401 (1st Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976). In addition to holding that pupil assignment and other actions were discriminatory, the district court found that defendants discriminated in the area of faculty and staff hiring[1] and assignment. 379 F.Supp. at 456-66. Accordingly, the court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20 percent (the approximate percentage of blacks in Boston at that time),[2] with affirmative recruitment to continue until a figure of 25 percent black faculty was reached, *Morgan v. Kerrigan*, 388 F.Supp. 581 (D.Mass. 1975), and this court affirmed, 530 F.2d 431 (1st Cir.) *cert. denied*, 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976). An order to the same effect with respect to administrators was entered on February 24, 1976; this order was neither published nor appealed. In 1978, the district court found that the defendants had not complied with its faculty recruitment and hiring orders, and therefore modified those orders to require that the percentage of black teachers increase annually by at least one and one-half percentage points until the 20 percent goal was attained. This unpublished order was entered July 5, 1978 and was not appealed.

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[1] In 1972-73, 5.4 percent of the permanent teachers were black; in 1970-71, 3.5 percent of the administrators were black. 379 F.Supp. at 463.

[2] The percentage of black students in the Boston public schools at that time was approximately 35 percent. *Morgan v. Kerrigan*, 388 F.Supp. at 582. Preliminary 1980 census figures show an overall black population in Boston of over 22 percent; the projected percentage of black children in the Boston public schools for 1981 was over 46 percent.

By early 1981, the percentage of black teachers was 19.09 percent and that of black administrators 20.53 percent. This progress was threatened, however, by a budget crisis precipitated by decreased funding. In order to comply with its reduced budget, the Boston School Committee considered massive layoffs of teachers and administrators. It was faced, however, with conflicting obligations: on the one hand, its collective bargaining agreements called for layoffs by reverse seniority; on the other, such a procedure would drastically reduce the percentage of black teachers and administrators (most of whom had been hired in the last few years and thus had little seniority), in violation of the district court's desegregation orders. The School Committee decided that if layoffs of teachers proved to be necessary, they should be conducted so as to maintain the current percentage of black teachers, but layoffs of administrators, if necessary, should be conducted by reverse seniority. It filed motions with the district court for approval of these decisions. On June 2, 1981, the district court granted the motion — with minor modifications — with respect to the teachers.[3] On July 9, 1981, it denied the motion with respect to the administrators and ordered that the percentage of black administrators be maintained even in the face of layoffs.

The court's orders were conditional. That is, they did not themselves mandate any layoffs. Rather, they simply specified the principles determining who should be laid off if, for reason of economics or otherwise, layoffs

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[3] The order also specifies that laid-off black teachers will have an absolute preference in recall until the 20 percent goal is reached. The order suspends the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25 percent black faculty, until all tenured teachers who are laid off have been recalled.

were in fact made. Layoffs have since taken place in accordance with the priorities established in the court orders, thus maintaining the existing percentages of black faculty and administrators at close to 20 percent. The Boston Teachers Union ("BTU") asserts that between 700 and 1,100 teachers have been laid off. If the seniority approach had been followed, this would have reduced the percentage of black teachers to somewhere around 8 percent. Our information on the administrators from the Boston Association of School Administrators and Supervisors ("BASAS") is more precise: 15 headmasters and principals with permanent appointments were laid off. If seniority had been followed, 13.8 percent of those remaining would be black.

The appeals consolidated here for our review are as follows. In No. 81-1561, intervenor BTU appeals from the June 2 order and from the district court's denial of its request for reconsideration of that order on July 24, 1981. The plaintiff class, the School Committee, the State Board of Education, and intervenors El Comite de Padres Pro Defense de la Educacion Bilingue and Concerned Black Educators of Boston ("CBEB") have filed briefs as appellees; the A. Philip Randolph Institute has filed a brief as *amicus curiae* urging reversal. In No. 81-1617, intervenor BASAS appeals from the July 9 order. The appellees are the same as those in No. 81-1561, with the exception that the School Committee takes no position in this appeal. Finally, Nos. 81-1618, 81-1619, and 81-1646 are appeals brought by CBEB arguing that the orders do not go far enough in remedying past discrimination. No. 81-1618 is from the June 2 order; No. 81-1619 is from the denial of CBEB's motion to rescind that order; and No. 81-1646 is from the July 9 order.

The standards for equitable remedies in school desegregation cases have been set forth by the Supreme Court in *Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745 (1977). As discussed *infra*, we believe that the district court committed no abuse of discretion under *Milliken*, and we therefore affirm its orders. We note additionally, however, that the procedural posture of this case also argues for an affirmance. BTU asserted virtually none of the arguments it now presents on appeal to the district court during the argument conducted below concerning the faculty order entered June 2. At that argument, it chiefly spoke against the need for any layoffs and also against proposals to tailor the layoff procedure so as actually to increase beyond present ratios the percentage of black faculty. As far as we can glean from the record, it did not argue that the Boston School Committee's proposed formula for laying off teachers — the formula largely adopted by the district court — would involve unconstitutional discrimination, nor did it make any request for an evidentiary hearing, until its motion for reconsideration filed almost seven weeks after the original order. The district court must have broad discretion in deciding such motions for reconsideration, especially where no reasons are advanced for the movant's failure to present its arguments earlier. *Cf. Willens v. University of Massachusetts*, 570 F.2d 403, 406 (1st Cir. 1978) (discretion to grant relief from judgment). Similarly, BASAS did not argue that the district court's maintenance approach was unconstitutional at the July 9 hearing on the motion with respect to the administrators. Finally, CBEB had filed no motions until after the June 2 order was entered; the district judge understandably expressed considerable doubt as to his ability to grant the relief CBEB requested

in the absence of a prior motion. On appeal, the district court's exercise of its discretion is judged by the information and motions before it at the time it rendered its decision — not by hindsight. On this basis, it would be difficult — quite apart from our view of the substantive merits as discussed below — to overturn the lower court's handling of the various issues then before it.

The importance of this case, however, and its human impact naturally make us hesitant to decide on procedural and technical grounds. We thus turn to the merits of the controversy. The first *Milliken* requirement is that, "like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the *condition* alleged to offend the constitution. . . .' " *Milliken v. Bradley*, 433 U.S. at 280, 97 S.Ct. at 2757 (citations omitted; emphasis in original). It is plain that the present order, aimed at preserving a goal concerning the percentage of black teachers and administrators, is directly related to the unconstitutional conditions earlier found by the district court. This court has twice upheld the underlying district court orders concerning the percentage of black faculty as part of the desegregation remedy. *Morgan v. Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 431 (1st Cir. 1976). In 1975, we said that, having "found pervasive violations of the constitutional rights of black school children in the Boston schools," the district court had an "obligation . . . to rectify those violations," and we concluded that orders related to the percentage of black faculty "are directed toward the objective of eradicating the segregated system that has prevailed in the Boston schools, and [are] clearly within [the district court's] power in the context of this case." 509 F.2d at 600-01. We

further held in 1976 that the 20 percent goal was a valid part of the effort "to eliminate segregation and its effects 'root and branch,' " 530 F.2d at 432, *citing Green v. County School Board*, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968). The 20 percent formula is thus clearly a part of the remedy earlier approved in this case to rectify the unconstitutional conditions found to exist. The purpose of the orders under review is to safeguard the progress toward desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made.

[1] Unlike BASAS, BTU never really argues otherwise. Rather, it asserts that desegregation has now been accomplished and that the district court's powers are therefore at an end. *See generally Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). This argument has no basis in the present record, however. We find no indication that BTU ever moved in the district court that the court should withdraw, nor has it requested a hearing for the purpose of introducing evidence in support of such a motion.[4] Absent proceedings and proof showing that Boston's dual school

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[4] While BTU's motion for reconsideration included a request for an evidentiary hearing, *see infra* p. 29, that hearing was, as stated in the motion, "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order."

system has been abolished, the district court retained power to make orders premised on the unconstitutional conditions it found to exist.[5]

[2] We turn next to the second *Milliken* requirement: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Milliken v. Bradley*, 433 U.S. at 280, 97 S.Ct. at 2757 (citation omitted; emphasis in original). Appellants BTU and BASAS contend that the orders do not satisfy this requirement because they benefit black teachers and administrators who were never shown to be the victims of hiring discrimination. They cite cases such as *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) and *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), which they contend limit the award of retroactive seniority and like benefits to identifiable victims of hiring discrimination. The argument is that the district court's orders discriminate in employment and that they lack the proper factual predicate because no minority individuals have been identified as the victims of any discrimination.

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[5] The record before us amply supports a conclusion that the desegregation remedial goals have not been fully achieved. The 25 percent goal, which this court characterized as a "built-in terminus for court responsibility," *Morgan v. Kerrigan*, 530 F.2d at 434, is not even close to fulfillment. The 20 percent goal has been barely achieved with respect to the administrators and is close to achievement with respect to the teachers. This goal, however, was never intended to delimit the court's remedial powers, and, moreover, we noted that "time may indicate the goal to be too modest." *Id.* The plaintiff class has indicated below that it desires to increase the 20 percent figure to over 22 percent. The court stated that its rulings here under review were without prejudice to the proposals to increase the 20 percent goal.

A similar argument was made to this court when the 20 percent goal was first ordered, and we rejected it then, as we do now:

> This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's . . . policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect.

*Morgan v. Kerrigan*, 530 F.2d at 432. *See also Morgan v. Kerrigan*, 509 F.2d at 600 n.3. It has been recognized from the beginning that the victims here are the black school children, not the possible hiring discriminatees. *See Morgan v. Hennigan*, 379 F.Supp. at 456. The orders are thus designed, insofar as possible, to make the school children whole. Proof of individual hiring discrimination is irrelevant. The employment cases cited by appellants are inapposite as to this issue. *See Arthur v. Nyquist*, 520 F.Supp. 961, 966 (W.D.N.Y. 1981).

The plaintiff class has a right to an education in a school system free of racial discrimination in the employment of teachers and staff. *Morgan v. Hennigan*, 379 F.Supp. at 456, 463. The elimination of the vestiges of a segregated school system cannot be accomplished until the effects of past hiring discrimination have been eradicated. *See supra* p. 26. Such discrimination, if allowed to continue, may lead to difficulties in fully integrating the schools and in eliminating the maintenance of a dual school system. An integrated faculty and staff is also necessary to bring black students

and parents fully into the school community and decision-making processes and to counteract their past isolation. A racially balanced faculty also provides black students with role models, which may be "important because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race." *Oliver v. Kalamazoo Board of Education*, 498 F.Supp. 732, 748 (W.D. Mich. 1980), *appeal pending*. We thus conclude that the orders here are remedial: they are designed to make the children whole, to vindicate their rights, and that is indeed their effect. Indeed, under the principle of the law of the case, such a conclusion is compelled by our past decisions in this case.

[3] Appellants argue further that even if these orders are remedial, they constitute forbidden racial preferences. Once again, we have already rejected a similar argument with respect to the one-for-one hiring ratio, *Morgan v. Kerrigan*, 530 F.2d at 432 n.2, and we do so now with respect to the instant orders. Once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 477-78, 100 S.Ct. 2758, 2774, 65 L.Ed.2d 902 (1980) (Burger, C. J., announcing the judgment of the Court); *id*, at 517-19, 100 S.Ct. at 2794-2796 (Marshall, J., concurring in the judgment); *Regents of the University of California v. Bakke*, 438 U.S. 265, 305, 98 S.Ct. 2733, 2756, 57 L.Ed.2d 750 (1978) (Powell, J., announcing the judgment of the Court); *Id.*, at 362-79, 98 S.Ct. at 2784-2793 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Indeed, once a court has found racial discrimination in a school case,

race-conscious remedies not only are permitted, they are said to be required where colorblind approaches would be inadequate. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 28, 91 S.Ct. at 1282; *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

There are, of course, limits to the use of race-conscious remedies, whether they be statutory or court-ordered. We have stated that

> racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. . . . [T]he means chosen to implement the compelling interest should be reasonably related to the desired end.

*Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9, 17-18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974). The constitutional violations found in this case certainly, under the precedents cited *supra*, constitute the "compelling need" for a race-conscious remedy. Once this has been established, the proper test is essentially one of reasonableness. Other circuits are substantially in accord, stating, for example, that affirmative action plans may not "unnecessarily" "trammel" the interests or opportunities of whites. *See Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir.), *cert. denied*, — U.S.—, 102 S.Ct. 972, 70 L.Ed.2d — (1981); *Detroit Police Officers Association v. Young*, 608 F.2d 671, 696 (6th Cir.), *cert. denied*, — U.S. –, *101 S.Ct. 3079, 69 L.Ed.2d 951 (1980); United States v.*

*City of Miami*, 614 F.2d 1322, 1339, *reh. en banc granted*, 625 F.2d 1310 (5th Cir. 1980); *see also United Steelworkers of America v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979)

The orders here meet this test of reasonableness. They were necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be countenanced. *See generally Green v. County School Board*, 391 U.S. at 438-39, 88 S.Ct. at 1694; *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977). Nor was the position taken by the district court an extreme one: CBEB, for example, argues that it should have gone much further. The court postponed achievement of the 25 percent goal, rather than ordering a layoff procedure to meet that goal. It chose to forego using the layoffs as a means of achieving greater desegregation, in favor of simply ensuring that they did not threaten the progress already made.[6]

We thus conclude that the district court's orders were a reasonable response to the situation which confronted it, and that, in the circumstances, they do not constitute forbidden racial preferences. In what is to our knowledge

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[6] This discussion also serves to dispose of the issues raised by CBEB's appeals. CBEB essentially contends that the layoffs should not slow progress toward the 25 percent goal. We cannot say that the district court abused its discretion in entering the orders it did. The 25 percent goal, while real, *see* note 5, *supra*, was not to be achieved by hiring preferences, but simply by affirmative recruitment. The proposed layoffs presented the court with difficult decisions involving competing interests. As discussed above, we think the orders entered were reasonable.

the only other case dealing with this precise issue, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See Oliver v Kalamazoo Board of Education*, 498 F.Supp. 732, 750-55 (W.D. Mich. 1980), *appeal pending*. We are not unmindful of the substantial human costs engendered by these layoffs, but those costs are, for the most part, the product of the layoffs themselves, and not of the court orders, which in themselves required no layoffs at all. We understand, and sincerely regret, the fact that the expectations of certain teachers have been defeated,[7] but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The district court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it.

We turn, then, to the last prong of the *Milliken* test:

> [T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. . . . If, however, "school authorities fail in their affirmative obligations . . . judicial authority may be invoked."

*Milliken v. Bradley*, 433 U.S. at 280-81, 97 S.Ct. at 2757 (citation omitted). This factor cuts in favor of the district court's decision with respect to the teachers, since the

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[7] We do not accept appellants' argument that the collective bargaining seniority provisions preclude the court from taking the action it did. In the first place, the contract with the teachers provides that the layoff and recall procedure shall be subject to all lawful federal orders. Second, the contracts alone cannot bar a federal court from granting effective relief for constitutional violations. *See Arthur v. Nyquist*, 520 F.Supp. at 965, and cases cited therein.

district court accepted (with only minor modifications) the Boston School Committee's own proposal for dealing with the situation. This is not a case where a judicial formulation has been imposed upon a resistant and objecting local administrative body. The factor initially weighs against the order in the administrator's case, because the court refused to grant the School Committee's motion to conduct layoffs by seniority. For several reasons, however, this alone does not mandate reversal. First, the order is not particularly intrusive into local affairs; it simply mandates continued compliance with earlier orders, without becoming involved in such local matters as control of the budget, *see infra* p. 30. Second, the School Committee itself has taken no position in this appeal, so it is difficult to accept an argument premised on that body's interest in managing its own affairs. Indeed, the other local authority involved, the State Board of Education, has filed a brief in support of the order. Finally, as *Milliken* itself recognizes, even the interest of local authorities could not preclude a court from remedying constitutional violations. More intrusive measures have been authorized, where necessary, in other aspects of this case. *See Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed.2d 755 (1977) (South Boston High School receivership).

[4] Appellant BTU raises one final argument, that the district court erred in failing to hold an evidentiary hearing before granting the School Committee's motion. We note at the outset that BTU never requested such a hearing until its motion for reconsideration, which by itself provides a strong reason for rejecting the argument, *see supra* pp. 25-26. In addition, the evidence that BTU wishes to present is, for the most part, either sufficiently

known to the district court or irrelevant. The district court was apprised of the fundamental information it required for a decision: the impact that layoffs would have on compliance with court-ordered remedies. The court was certainly aware of the impact that layoffs would have on those laid off. The layoffs themselves were never ordered by the court, whose orders were conditional, *see supra* pp. 24-25. Nor was the court obliged to consider budget reallocation as an alternative to the layoffs, since the School Committee's own motion kept it in substantial compliance with the court orders. Absent noncompliance, the court would have no justification to intrude upon local matters such as budget decisions. *Compare Oliver v. Kalamazoo Board of Education*, 498 F.Supp. at 746-50. We thus see no reversible error in the district court's denial of BTU's request for an evidentiary hearing in its motion for reconsideration.

*Affirmed.*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, et al.,

Plaintiffs,

vs.

No. 72-911-G

JOHN D. O'BRYANT, et al.,

Defendants.

JUL 30 1981

DOCKETED

MOTION FOR RECONSIDERATION, EVIDENTIARY HEARING AND STAY

MEMORANDUM OF LAW

DOCKETED

7/24/81
Upon consideration of these motions and supporting affidavits and memorandum, the motions are hereby denied without hearing oral argument or receiving written responses from the principal parties (who under Local Rules are entitled to respond on or before August 3, 1981, when the time within which intervenor BTU must appeal expires), the facts asserted in support of the motion were all known or assumed in a general way and considered by the Court at the time of its allowance, with modifications, of the school defendants' motion on 6/3/81. Chin. BR3186

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## ORDER

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, vs. John D. O'Bryant, et al., Defendants, No. 72-911-G)

The following is the typed text of Judge Garrity's July 24, 1981 Order denying BTU's Motion for Reconsideration, Evidentiary Hearing and Stay. The original handwritten Order appears on page A-17a.

> "Upon consideration of these motions and supporting affidavits and memorandum, the motions are hereby denied without hearing oral argument or receiving written responses from the principal parties (who under Local Rules are entitled to respond on or before August 3, 1981, when the time within which intervenor BTU must appeal expires). The fact asserted in support of the motions were all known or assumed in a general way and considered by the Court at the time of its allowance, with modifications, of the school defendants' motion on 6/2/81."

## CONDITIONAL ORDER MODIFYING FACULTY DESEGREGATION ORDERS

June 2, 1981

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, v. John J. McDonough, et al., Defendants, Civil Action No. 72-911-G)

Garrity, J.

After considering the written comments filed by the parties, and after hearing oral argument, the school defendants' motion for modification of faculty desegregation orders, filed May 15, 1981, is granted, and the court adopts the draft order submitted in conjunction with that motion, with the modifications outlined and explained at the hearing held on May 28, 1981, and incorporated herein. The statement of reasons dictated at the May 28 hearing constitutes the court's memorandum of decision on this matter.

The school defendants remain under a court-ordered obligation during the 1981-82 school year to increase the percentage of black teachers until the percentage of black teachers is not less than 20%. This obligation exists whether the teaching force is expanding or contracting and the relevant collective bargaining agreements are expressly subject to this and other court-ordered obligations. Notwithstanding the orders imposing such an obligation, which remains in effect, if layoffs are necessitated by the current fiscal crisis, the school defendants shall be deemed to be in compliance for the 1981-82 school year with the outstanding orders if they implement any such layoffs in accordance with the following procedure:

1. The layoffs will be performed in such a way that the systemwide percentage of black teachers will remain at the current level of 19.09%, and the systemwide percentage of other minority teachers will remain at its current level.

2. Blacks will receive an absolute preference for recall until a 20% figure is reached systemwide, which the court expects will be by March 1982.

3. Once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black.

The obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25% is suspended until all tenured teachers who will have been laid off have been recalled, provided that a pool of black applicants is maintained, by recruiting if need be, which is sufficiently large to assure the maintenance of the 20% figure.

This order is expressly conditional on predicted, major layoffs actually being made and is without prejudice to the plaintiffs' substitute motion for modification of faculty desegregation orders, filed May 26, 1981, and any parallel motions to be filed by plaintiff-intervenors El Comite and the Concerned Black Educators of Boston.

The obligations imposed by this and prior orders shall supersede Mass. G. L. c. 71, § 41.

/s/ W. Arthur Garrity, Jr.
United States District Judge

## TRANSCRIPT OF PROCEEDINGS

(United States District Court
District of Massachusetts)

(Tallulah Morgan, et al., Plaintiffs, v. John O'Bryant, et al., Defendants, Civil Action No. 72-911-G)

Before: Hon. W. Arthur Garrity, Jr.,
District Judge

Court Room No. 5
Federal Building
Boston, Massachusetts
May 28, 1981

Appearances:

Larry J. Johnson, Esq., for the plaintiffs.

Doyle, Playter, Novick & Berkin, Esqs., by Atty. Caroline B. Playter, for El Comite de Padres.

Goodwin, Proctor & Hoar, Esqs., by Henry C. Dinger, Esq., for the defendant School Committee.

Robert H. Bohn, Esq., Assistant Attorney General, and Robert H. Blumenthal, Esq., Counsel, Board of Education, for the state defendants.

Atty. Marcia Seeler and Steven P. Perlmutter, Esq., Assistant Corporation Counsel, for the non-School Committee city defendants.

Grady and McDonald, Esqs., by James T. Grady, Esq., for the Boston Teachers Union.

Segal, Roitman & Coleman, Esqs., by Richard W. Coleman, Esq., for the Boston Association of School Administrators and Supervisors.

Choate, Hall & Stewart, Esqs., by W. Shaw McDermott, Esq., for the Boston Home and School Association.

Henry F. Owens, III, Esq., David Casey, Esq., and Atty. Nancy Gertner, for the Concerned Black Educators of Boston.

## TRANSCRIPT OF PROCEEDINGS
(pages 65-75)

* * *(65) Now, I am going to decide this motion with respect to the modification of faculty desegregation orders now, and state at least some of the reasons, because you can see what happens when I say I will take something under advisement.

With respect, for example, to the school closings, that was three years ago, and I still haven't gotten out the detailed findings with respect to it, just the central findings.

Here, it will be a little different. I will rule on it, and basically it is to grant the motion with certain qualifications, which I will explain, but the form of order (66) will be issued subsequent to today, and I hope I am not jinxing myself by saying I think it will be tomorrow. It is just a question of minor language, not great findings, but I will state now the way the order will read, and then the reasons.

The changes in the order look to me to be five. It is adopted generally for reasons that I will explain, but now the modifications are that I will call it conditional and make it clear that the Court is not in any way trying to pre-empt issues that the Teachers Union and others are litigating in the state courts in entering this order. It is if dismissal can be made applicable only in that event, and that is implicit in the motion and the draft order, but it should be explicit.

Secondly, there is nothing controversial about this second one either. The language will be changed to make it clear that the order supersedes only Section 41 of Chapter 71, and not any other section, such as Section 38(g), that has to do with certification.

Next, it will include a provision in the order that the present level of other minority faculty and staff be maintained, and only that. It will not go beyond that, at this time, at least.

Next, it will enlarge upon the language in the second paragraph, Paragraph Number 3, along the lines of Mr. Blumenthal's talking about a gap that should be closed, (67) and here is the best language I can give you at the moment, but it will be refined when the order comes out.

It would add on to the sentence that the obligation to engage in affirmative recruitment of black teachers until the relevant percentage equals 25 percent is suspended until all tenured teachers who will have been laid off have been recalled, and to add the language, provided that a pool of black applicants is maintained, by recruiting, if need be, which is sufficiently large to assure the maintenance of the 20 percent figure which the Court expects will be attained by March of next year.

The order lastly will also make some reference to its being without prejudice to the proposals of the plaintiffs and the Black Educators and the other minority, El Comite, parties intervenors, to seek changes in the basic order to which this relates, that is to say, to make the percentage of OMs fixed to make the percentage of black faculty 22.4 instead of 20 and 25 percent, as Mr. Owens argues. This order is not intended to rule on that series of proposals.

Now turning to the reasons for the order. The first reason is that it does not in any way disable the School Department from complying with the outstanding order of getting 20 percent black faculty by March of 1982. It is in March of each year that the percentage is computed to see whether the court orders that there should be

one-half percent increase in (68) the number of black faculty each year, starting in 1978, until 20 percent is achieved.

I think it is almost certain, although it cannot be guaranteed, that there will be 20 percent black faculty and staff in the schools in March of next year.

Mr. Dinger said it in a sort of offhand fashion in his closing remarks. I think that if this plan is followed, the court order will be, if this plan goes into effect and if Mr. Grady loses in the state court, and so forth, that there will not be a violation of the orders of the Court as they stand today, that is, as of May 28, 1981. The order is that 20 percent be achieved, and I think it will be. We know that it will be no less than the 19.1 percent.

That is the first major reason. The second is one that has been recognized in the cases and received only sort of passing recognition today, or yesterday, in the arguments, and that is the legitimate job expectations of which teachers who have devoted the last five, ten, or fifteen years to serving the School Department.

I hardly heard a reference in all of the arguments that were made, although I know that people have had that in mind, how much has anybody talked about the white teacher who has been throwing himself or herself into his or her work for the schools of the City of Boston for the last decade, and is going to be bounced by this enormous layoff that is the (69) hypothesis that underlies the motion here?

There is a lot of talk about the excess teachers. There is a lot of talk about the teachers in general. But what about the individual teachers? Doesn't anybody think of the legitimate job expectations of a teacher who has been working, let's assume, just as wholeheartedly for the education, and the desegregated education, of the children in the city, and is that teacher to be given no consideration?

The law, in my understanding, is otherwise. Cases, and I will cite a couple of them, have ruled that the job expectations of tenured white teachers, and nontenured as well, but especially the tenured white teachers, should be accorded weight in hearings such as this. The cases that I have reference to have been cited, Oliver and Brown. Oliver against Kalamazoo Board of Education, Western District, 1980, 498 F. Supp. 732. The Angus Brown case is Carl Neave et al., Sixth Circuit, March 31, 1981, Cases Number 80-3468 and 3476.

So that is the second principal ground of the Court's basic order here.

Thirdly, and this is now a page from the School Department's booklet that they have been filing and refiling on these matters for the last several years, the Court's orders contemplated faculty and staff desegregation in the course of hiring. One of the means, the means of achieving the 20 percent black faculty and staff figure of a reduction (70) in force, or a RIF, as it is called, simply was not contemplated at the time of these original orders.

It was, I will state, for completeness and for candor, contemplated at the time of the 1.5 percent annual increment of black faculty. It was then realized by me that there would, in all likelihood, have to be reductions in force, or certainly very few new hires, and the 1.5 percent annual increment was ordered, having in mind the possibility of a reduction in force, but nothing like what is now in prospect.

So the Court is not prepared to order, as a means of achieving this 20 percent goal, a reduction in force type plan different from the one proposed by the school defendants. The school defendants have demonstrated their good faith in seeking to comply with these orders, and not just because they are orders, but with the

affirmative action programs, meaning black and other minority hiring and maintaining, by taking a stance not simply at odds with the Boston Teachers Union and BASAS, but also recognizing that this is going to cause genuine hardship to white teachers who have double or triple the tenure that the average black teacher has.

For the Court to use a RIF, that is, use a reduction in force, beyond the plan which has been adopted and filed by the School Department would, it seemed to me, inevitably engender bitterness, I would hope temporary, but it would set groups of white teachers against groups of black teachers, it seems to me, (71) and would cause discord and racial tension in the faculty and staff of the schools rather than at the teacher and parent level.

These are important, delicate considerations, and there is an effort always by all of us — and I will include myself explicitly — to achieve these goals without unnecessary creation of discord or tension, especially along racial lines.

I stated, and will restate, that what we are talking about at this hearing, it strikes me, is really more — yes, more instead of as much as — more a matter of principle than a practicality. That is to say, the 20 percent goal I think is going to be achieved in the spring of next year, whatever position is adopted here, whether it is to insist upon the language and compliance with the orders as they now stand or the relatively minor modifications that must be made to comply with the school defendants' proposal as modified in minor respects by the Court.

Lastly, in my view, the percentage of black faculty and staff which is required for student desegregation purposes today is, if anything, less than what was needed when I first entered these orders in 1975.

That is an odd one, isn't it? How could I feel that, with the black student population of the schools increasing from roughly 35 or 6 percent when these orders were first

entered up to 46 percent now, how could I feel that fewer (72) rather than more black teachers and staff should be required?

This has to do with the nature of the case and the purpose for which those orders were originally entered. They were entered first for the reason of role models. The difference between 19 and 20 percent, as far as the number of role models are concerned, is de minimis minimis, if that means extremely de minimis. There is no practical difference with respect to the number of role models.

But the other reason underlying the establishment of the 20 percent figure was to counteract, by increasing the number of black faculty and staff, the isolation that was experienced by many black students and their parents in the public schools back when these orders were first entered in 1975.

If anything, that reason underlying the order for increased black faculty and staff is less urgent now than it was then. You don't have the isolation and discrimination against black students and parents in the Boston public schools that you had six or seven years ago. Sheer numbers, the numbers of black students, and the activities of the parent organizations and of the community organizations, and in other respects, the extent — without going into all of the history of the last several years — the extent of discrimination against black students and parents today in the Boston public schools is, in my estimation or opinion and belief, very much less than what it was before the Court entered these (73) orders.

So that the bottom line on that last reason is the line that I have repeated fifty times over the last several years in this case, and that is, it is the students and the parents who are of necessary and principal concern to

the Court in a student desegregation case. This is a student desegregation plan.

It is true that increased black faculty and staff have a role, but it is a secondary role, it is a derivative role, and, if anything, the need for increased black faculty and staff in my opinion is less today than what it was then.

That doesn't mean that the Court has abandoned for a moment the 20 percent goal, or the 25 percent goal either. Those are dual goals, but I think it is very important here to consider all of the parties in interest, and the interests of the children and the parents are primary. Those of teachers are subsidiary; they are secondary.

Now, it would be possible, I am sure, to mention other subsidiary or ancillary reasons, but those are the principal reasons, the four that I have given, and that constitutes the Court's memorandum of reasons. I will get out, however, the order with the modifications that I have stated.

Now let me say that we have got a hearing here a week from today at 3:30, principally on South Boston High School. Get your motions in, if you wish to file motions about the (74) 22.4, the 25 percent, et cetera, and I won't hear them next week unless this criminal case I have folds, which I mentioned to you yesterday. There are nine defendants and witnesses from all over the country, and they tell me it is going to last four or five weeks.

If by any chance that case will end, I will have a hearing promptly on these motions that you are talking about, but we will just have to wait and see. We will not hear these motions next Thursday. I am talking about the motions to increase to 22 or 25 percent, or the other minorities motions, but it will be principally on the South Boston situation. I will set a date, though, at that time, if you get the motions in, when we will hear those

motions, as to which this ruling is without prejudice.

Now Mr. Dinger rises to ask for some clarification, I can tell without his even saying it, because that is the type of motion that they filed, a motion for clarification.

Mr. Dinger: Not with respect to the five changes — well, with respect to one of the changes that the Court made, and that is the portion that granted the motion subject to the motions that plaintiffs and El Comite and the Concerned Black Educators may file.

The Court: Not subject to. Without prejudice. There is a difference.

Mr. Dinger: All right. Then I will rest at that.

(75) The Court: Yes, Mrs. Playter.

Mrs. Playter: Your Honor, I note the Court indicated that it would include a provision to maintain the present level of other minority teachers but no provision in terms of recruitment for future maintenance, so that we could get — I am just not clear. Again, this is for clarification. Next year —

The Court: Well, I wanted to say, but I didn't, and I am not sure it will go in, because I don't want to handicap El Comite, this maintenance order I am clear should be included. I always look, and I don't know — Let me start again. I am just not that familiar with the Lau versus Nichols agreement to know whether I can fairly relate El Comite to the Lau agreement remedies that it has in these respects. I know that this was an agreement that was bargained for between you and your clients and the School Committee. I like, to the extent fair, to, if you will, pass over to the Lau agreement, to the extent that it can fairly be done, questions having to do with other minority interests here. That is the reason I didn't say anything explicitly. I am sure you are entitled to maintenance, in my view, and there will be an order to that effect entered. I am just not sure about the other dimensions of it.

* * *

# JUDGMENT

(United States Court of Appeals
For the First Circuit)

Entered: Feb. 17, 1982

(No. 81-1561: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John O'Bryant, et al., Defendants-Appellees, Local 66, Boston Teachers Union, AFT, AFL-CIO, Intervenor-Appellant.)

(No. 81-1617: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Boston Association of School Administrators and Supervisors, Plaintiff-Appellant.)

(No. 81-1618: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

(No. 81-1619: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

(No. 81-1646: Tallulah Morgan, et al., Plaintiffs-Appellees, v. John D. O'Bryant, et al., Defendants-Appellees, Concerned Black Educators of Boston, Plaintiff-Intervenor, Appellant.)

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows: The order of the District Court of June 2, 1981, and the order of July 24, 1981 denying reconsideration of that order are affirmed;

The order of the District Court of July 9, 1981, is affirmed; and

The order denying Concerned Black Educators of Boston's motion to rescind the June 2, 1981 order is affirmed.

No costs on appeal.

By the Court:

Dana H. Gallup
Clerk

[cc: Messrs. Miller, Kelly, Johnson, Simonds, Blumenthal, Somers, Mss. Playter and Gertner]

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

(Local 66, Boston Teachers Union, AFT, AFL-CIO, Petitioner v. Boston School Committee, et al., No. A-900)

UPON CONSIDERATION of the application of counsel for petitioner.

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 17, 1982.

/s/ William J. Brennan
Associate Justice of the Supreme
Court of the United States

Dated this 23rd day of April, 1982

# COLLECTIVE BARGAINING AGREEMENT

BETWEEN THE
BOSTON TEACHERS UNION

LOCAL 66

AFT

AFL-CIO
AND THE
SCHOOL COMMITTEE
OF THE CITY OF BOSTON

## ARTICLE IV

## WORKING CONDITIONS

### A. GENERAL

• • •

**5. Seniority Defined**

Seniority in the teachers' unit is defined as total years of professional service in the Boston school system for which salary credit is given for step advancement, including years on maximum whether

or not such teaching experience (120 days) results in a provisional contract in any year.

Time spent in authorized leave of absence granted for any reasons prior to September 1, 1980 will continue to count as seniority in the teachers unit. Paid leave of absence granted on or after September 1, 1980, including leave covered by workmen's compensation, will continue to count as seniority in the teachers' unit. Unpaid leave of absence granted on or after September 1, 1980 for any reason other than for union business under IVA, 8(a) will not count as seniority in the teachers' unit. The Union will indemnify the Committee against any cost or damages arising out of any dispute or proceeding connected with the prior sentence.

This provision shall become effective upon mutual approval of the revised seniority list or on January 1, 1979, whichever occurs sooner. Until seniority as redefined hereunder becomes effective, the current definition of seniority shall remain in force.

The Union shall be supplied with a current seniority list of all members of the bargaining unit.

* * *

## C. OTHER WORKING CONDITIONS

* * *

### 16. Job Security

Effective September 1, 1980 through June 30, 1982, any teacher or nurse with tenure or permanently

appointed shall continue to be employed. This provision expires June 30, 1982.

**17. Layoff and Recall Procedure**

(a) This layoff and recall procedure will not apply to nontenured teachers but will apply to teachers with tenure and to nurses or other persons permanently appointed.

For the purpose of this section, all nurses with more than 3 consecutive years of service are deemed to be "permanently appointed" and nursing service will be considered a separate certification area.

(b) An employee will be given written notice of layoff by April 15 of the professional work year preceding the professional work year in which the layoff is to take place. For example, an employee to be laid off effective September, 1982 must be given written notice on or before April 15, 1982.

(c) Employees will be laid off in reverse order of seniority as defined in Article IVA 5, except that for the purpose of layoff seniority will be by certification area and an employee will be deemed to hold seniority rights in all areas in which he holds state certification. Seniority lists of laid off teachers by certification shall be made available to all of said teachers. The more senior teachers within a certification area with notice of layoff may exercise their seniority rights in the following order:

(1) by displacing the most junior teacher in all of the state certification areas in which he

taught satisfactorily for at least three (3) of the ten (10) years immediately preceding the effective date of the layoff;

(2) by displacing the most junior teacher in all of the other areas in which he holds state certification.

(d) A person promoted out of their bargaining unit on or after 9/1/80 will retain full seniority rights in all areas in which he holds state certification but shall not accrue seniority while outside of the bargaining unit. For purposes of this section a teacher "on assignment" outside of the bargaining unit for more than sixty (60) days is not considered to have been "promoted" and may continue to accrue seniority within this bargaining unit. Any person promoted out of this bargaining unit prior to 9/1/80 may continue to accrue seniority within this bargaining unit. For the purpose of this section, an employee with notice of layoff may exercise his seniority rights in the order specified in subsection (c).

(e) In any school year following the year in which any tenured teachers in Grades K-5 have received notice of layoff, the class size maximum for Grades K-5 shall not exceed 33. In any school year following the year in which any tenured teachers in Grades 6-12 have received notice of layoff, the class size maximum for Grades 6-12 shall not exceed 36. The provisions of this Section supersede any conflicting provisions of Article IV A I.

(f) **Recall**

(1) Persons on recall will be given first preference in filling permanent vacancies within the bargaining unit. Teachers will be recalled by seniority within their state certification areas on file. Seniority shall not accrue to an employee while on recall.

(2) Teachers on recall who are hired as *per diem* substitutes shall be paid at the *per diem* substitute rate and shall remain on recall.

(3) Recall rights shall be retained for two (2) years from the effective date of layoff unless sooner terminated by rejection of two (2) full-year recall offers or failure to report for work within fifteen (15) calendar days after receipt of such recall notice.

(g) **Resolution of Disputes**

Same as IIIC 20 of predecessor contract, except delete "excessing policy" or "excessing procedure" and substitute "layoff and recall procedure."

(h) A joint committee of the parties will plan for the establishment of a career transition plan to retrain teachers for positions within the school system and for linkages with the private sector to enable teachers to explore retraining opportunities for new careers. The target date for the establishment of this program is September 1, 1981.

(i) This layoff and recall procedure is subject to all applicable State and Federal laws and lawful Orders pursuant thereto.

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No. 81-2306.

# In the Supreme Court of the United States.

OCTOBER TERM, 1981.

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
PETITIONER,

v.

BOSTON SCHOOL COMMITTEE, ET AL.,
RESPONDENTS.

IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## Brief of the Boston School Committee and Superintendent of Boston Public Schools.

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## Question Presented.

Does a district court abuse its remedial discretion in a school desegregation case by directing school officials to maintain the existing percentage of black teachers during a substantial reduction in force when (1) prior orders oblige those officials to increase the percentage of black teachers as part of the desegregation remedy and (2) the seniority provisions of the teachers' collective bargaining agreement are expressly subordinated to lawful federal court orders.

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## Brief of the Boston School Committee and Superintendent of Boston Public Schools.

### Parties to Proceedings Below.

Petitioner's statement is accurate except that the defendants are: The Boston School Committee, the Superintendent of the Boston Public Schools, the Mayor of the City of Boston, the Public Facilities Department of the City of Boston, the Massachusetts Board of Education and the Massachusetts Commissioner of Education.

## Preliminary Statement.

This brief is submitted on behalf of the Boston School Committee (the "School Committee") and the Superintendent of the Boston Public Schools in opposition to a petition filed by Local 66, Boston Teachers Union (the "BTU") for a writ of certiorari to the United States Court of Appeals for the First Circuit, which petition seeks review of the decision of that court in *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1982).

## Statement of the Case.

The statement of the case contained in the petition accurately states the original liability findings of the district court. However, the School Committee does not accept the description of the remedial approach taken by the district court in the area of faculty desegregation. The petitioner's statement also omits reference to a material provision of its collective bargaining agreement with the School Committee.

The district court found that the School Committee has contributed to the dual school system by hiring and promoting a disproportionately small number of black teachers and segregating that small number in black schools. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-466 (D. Mass. 1974), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The initial faculty desegregation remedy ordered the School Committee to hire black and white teachers on a one-for-one basis until 20% of the faculty was black. *Morgan* v. *Kerrigan*, 388 F. Supp. 581, 583 (D. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976). On July 5, 1978, the district court vacated the one-for-one requirement and adopted a more result oriented approach. After a series of hearings, the district court con-

cluded that insufficient progress had been made under the one-for-one hiring requirements. The district court ordered that the School Committee "see to it that the percentage of black teachers in the system as a whole exceeds by at least one and one-half percent (1½%), said percentage during the previous year," until the 20% target was reached. Memorandum and Further Orders on Faculty Recruiting and Hiring at 4 (D. Mass. July 5, 1978), Court of Appeals Appendix G.

The district court in this 1978 order abandoned its prior exclusive reliance on hiring to accomplish the remedial ends identified in 1975. The Court noted in a footnote to this order that the School Committee should consider "modifying the excessing policy" as a means to achieve this 1½% annual increment. The "excessing" procedures of the BTU collective bargaining agreement govern the ability of senior teachers whose positions have been eliminated to replace or "bump" more junior teachers within the same certification area. Thus, as the district court later explicitly acknowledged, it contemplated in July, 1978, that some modification of seniority rights might be necessary in order to accomplish the faculty desegregation remedy. *See* Appendix to Petition at A-24. Neither the BTU nor any other party to this case appealed from the 1978 order.

The collective bargaining agreement from which the BTU derived its seniority rights during a reduction in force was signed on September 1, 1980.[1] The layoff and recall provisions of that collective bargaining agreement were made expressly "subject to all applicable State and Federal laws and lawful Orders pursuant thereto." Appendix to Petition at

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[1] The BTU reports that this collective bargaining agreement contained a job security provision as well. Petition for Writ of Certiorari at 6 n.4. This provision was invalidated by the Massachusetts Supreme Judicial Court on May 12, 1982. *See Boston Teachers Union* v. *School Committee of Boston*, 386 Mass. 197, 211-214, 434 N.E.2d 1258, 1266-1268 (1982).

A-35. The July 5, 1978 order imposing the 1½ % annual increment requirement was in effect when this collective bargaining agreement was signed.

**Reasons for Denying the Petition for a Writ of Certiorari.**

This case does not provide a suitable occasion for this Court's discretionary review for a number of reasons. First, the BTU has not identified any conflict created by the decision below with that of any other court. Second, there are facts peculiar to this case which result in its failure to provide a useful guide to cases presenting otherwise analogous fact patterns. Third, essentially the BTU is seeking a determination, not that the district court committed an error of law, but rather that the district court abused its remedial discretion in a school desegregation case. The exercise of the lower court's discretion was in this instance proper, but in any event, certiorari is not appropriately granted merely to review a district court's weighing of the equities involved.

## I. The Decision of the First Circuit Conflicts With No Other Federal Court Decision.

The BTU has not identified a single court decision which conflicts with the ruling of the First Circuit's decision here. Indeed, petitioner acknowledges that the affirmance of the district court's decision is consistent with other rulings in both the First and Sixth Circuits. *See Stotts* v. *Memphis Fire Dept.*, 28 Empl. Prac. Dec. (CCH) ¶ 32,679 (6th Cir. May 7, 1982); *Boston Chapter NAACP* v. *Beecher*, No. 82-1642 (1st Cir. May 11, 1982); *Oliver* v. *Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980), *appeal pending*. Accordingly, there is no need for this Court to intervene to resolve a conflict among the circuits.

The conflict between the affirmative action aspects of school desegregation remedies and the collectively bargained requirements of seniority during a reduction in force is a fairly recent phenomenon. This case and *Oliver* v. *Kalamazoo Board of Education*, *supra*, appear to be the only reported school desegregation decisions which address this issue and the approach of these two cases is quite similar. If this approach is followed in other circuits, the need for this Court's resolution of this issue will be accordingly diminished. If differences in approach develop, this Court will benefit in its resolution of such conflicts by the considered judgments of a number of federal courts. In any event, resolution of the issues raised by the BTU at this juncture is unnecessary and would be premature.

## II. This Case Involves Unique Factual Circumstances Which Would Limit the Precedential Value of a Decision by This Court.

This case involves material factual circumstances which are not likely to be present in other cases presenting analogous legal issues. As a result, the value of this case as a precedent may be limited.

In this case, the collective bargaining agreement which created the seniority rights at issue here expressly subordinated those rights to outstanding federal court orders. Appendix to Petition at A-35. The BTU agreed to this subordination two years after the district court had entered orders directing the School Department to "see to it" that the percentage of black teachers increased by 1½ percentage points each year until 20% of the faculty was black. The BTU did not appeal this order. Since the order made no exception for reductions in force and, indeed, contemplated alteration of "excessing" procedures in an effort to accomplish the affirmative action goals, the BTU must have known that the subordination clause in the

collective bargaining agreement gave the staff desegregation requirements in outstanding orders priority over seniority rights *as a matter of contract*.

The specific order affirmed by the court of appeals did no more than relax somewhat the requirements of the 1½ % order of 1978. Under the 1978 order the School Department was obliged to reach the 20% target by the end of the 1980-81 school year. The June 2, 1981 order affirmed by the court of appeals permitted the percentage of black teachers to remain at 19.09% during the course of the reduction in force notwithstanding the obligation to reach 20%. This underlying obligation had been in effect since 1978, and the June 2, 1981 order was therefore simply a limited technical modification of that obligation which ameliorated to a modest degree the burdens on senior white teachers.

The upshot of this is that the June 2, 1981 order of the district court did not violate the contractual seniority rights of BTU's members. The BTU agreed in 1980 that those rights were "subject to" a court order which obliged the School Department to increase the percentage of black faculty members by any and all means until 20% of the faculty was black. Given this pre-existing obligation, the order here challenged actually benefitted senior white teachers, albeit only slightly.

The fact of this contractual subordination of seniority rights bears not only on the merits but also on the appropriateness of discretionary review of the decision of the court of appeals. It is reasonable to assume that, in the more typical case, the requirements of teacher desegregation orders will squarely conflict with collectively bargained seniority rights. *E.g., Oliver v. Kalamazoo Board of Education, supra*. The propriety of an order preserving affirmative action gains is less certain if such a conflict exists than in the present situation where the employer has bargained successfully for the right to implement its court ordered affirmative action obligations notwithstanding

the existence of seniority rights. The value of a decision by this Court in this case — at least a decision to affirm — would thus be seriously limited. The resources of this Court would be better reserved until a case presenting the conflict squarely were before it.

## III. The Order Challenged by Petitioner May be Reversed Only for Abuse of Discretion and There is Nothing Presented in the Petition to Suggest the Likelihood of Abuse.

Reduced to essentials, the BTU's argument is that the district court and the court of appeals failed to accord sufficient weight to the interests of senior white teachers when some junior black teachers were insulated from layoff during a substantial reduction in the teaching force. Since the formulation of a remedy in a school desegregation case is essentially an exercise in equitable discretion, *see, e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 279-280 (1977) (*Milliken II*); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 31 (1971), the order challenged by the BTU may be reversed only for abuse of discretion.

There is no indication in the record of this case that the district court abused its discretion in issuing the challenged order. The standards for fashioning a remedy in school desegregation cases were set forth in *Milliken II*, 433 U.S. at 280-281, and it was with reference to those standards that the court of appeals evaluated the district court's order and found no abuse. *See* 671 F.2d at 25-29.

The first requirement of *Milliken II* is that the remedy be "related to the *condition* alleged to offend the Constitution." *Id.* at 280 (citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 16). The unconstitutional condition in this case was the maintenance of an intentionally segregated school system which included policies resulting in

the segregation and nonhiring of faculty by race. *See Morgan* v. *Hennigan, supra*, 379 F. Supp. at 445-466. The district court ruled and the court of appeals affirmed the ruling that the creation of a 20% faculty was necessary to remedy that condition. *Morgan* v. *Kerrigan, supra*, 388 F. Supp. at 582-583. The BTU has already challenged that ruling unsuccessfully. The order challenged here merely made explicit what was implicit in the earlier orders: that the obligation to reach the 20% figure was an essential component of the remedy and, therefore, could not be sacrificed during a reduction in force. Since the challenged order undeniably furthered a goal which had already been determined to be related to an unconstitutional condition, the first *Milliken II* requirement was plainly satisfied.

*Milliken II* next requires that desegregation orders be "remedial," i.e. "designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" 433 U.S. at 280 (quoting *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974)). Again, the earlier rulings by the district court, unsuccessfully challenged on appeal by the BTU, establish the remedial character of the 20% requirement. *See* 530 F.2d at 431.

The third *Milliken II* requirement directs the district court to "take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." 433 U.S. at 281. This, too, was satisfied below. The district court's June 2, 1981 order granted (with minor modifications not here material) the motion of the School Committee proposing the model for effectuating the reduction in force adopted by the district court. *See Morgan* v. *O'Bryant*, 671 F.2d 23, 29 (1st Cir. 1982).

In this instance all three *Milliken II* factors were satisfied by the order of the district court. The BTU never seriously takes

issue with this.[8] Indeed, the BTU never even cites *Milliken II* in its petition. The BTU does not and cannot argue that racially conscious remedies are not a constitutionally valid remedy for past discrimination, for this Court has ruled to the contrary. *See, e.g., Fullilove* v. *Klutznick*, 448 U.S. 448, 482 (1980) (opinion of Burger, C.J.); *id.* at 517-519 (Marshall, J., concurring); *Swann* v. *Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 28. The BTU's point is simply that when people are being laid off, seniority rights deserve greater weight than the courts below gave them.

However, the BTU gives insufficient weight to the integrity of the desegregation remedy in this case. The court of appeals noted that if the district court had permitted the layoffs to be conducted in accordance with strict seniority, "the percentage of blacks would have fallen almost to its level nearly a decade ago." 671 F.2d at 28. The BTU does not dispute this observation. Surely the district court acted well within the scope of its discretion in refusing to countenance such an outcome.

Moreover, although the interest of the teachers who lost their jobs is surely a very important one to them and one not to be minimized in any respect, the district court did not order

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[8] The BTU points to certain oral statements made by the district court from the bench suggesting that the diminution in racial discrimination in the Boston Public Schools may have reduced the need for a particular percentage of black teachers. Appendix to Petition at A-25 to A-26. The BTU argues that the achievement of a 20% black faculty is *no longer* remedial. *See* Petition at 12. This argument is incorrect for at least two reasons. First, the context of the district court's comments make it quite clear that it was justifying the modification of prior orders which relieved the School Committee of the requirement of reaching 20% immediately. The diminution in racial discrimination reduced the urgency of keeping to the timetable fashioned in 1978 and no more. Second, neither the BTU nor any other party sought to reduce the 20% requirement. Accordingly, even if there were a basis for reducing the mandatory percentage of black teachers, the district court lacked the occasion to modify the prior orders.

the layoffs. The district court simply insisted that the integrity of its desegregation plan could not be sacrificed while layoffs caused by a fiscal crisis take place. This did not unnecessarily trammel the rights of senior white teachers because, as noted above, the collective bargaining agreement in effect acquiesced in that consequence when it subordinated seniority rights to the earlier court orders. Accordingly, the district court did not even violate the contractual expectations of senior white teachers.

In light of the foregoing, this Court cannot reasonably conclude that the challenged order was an abuse of discretion. There was no basis for the court of appeals to find that the district court's weighing of the equities was "clearly erroneous." *See Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10 (1980). Sifting through the record in this case for signs of such clear error cannot be considered the best way for this Court to devote its limited resources when the court of appeals adopted the correct legal standard and concluded that the district court's judgment was reasonable.

## Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Petitioner,*

v.

BOSTON SCHOOL COMMITTEE, *et al.*,
*Respondents.*

CONCERNED BLACK EDUCATORS OF BOSTON,
*Intervenor, Respondent.*

**In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**


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## Question Presented.

Is a judicial order in a school desegregation case equitable and constitutional where that order simply implements remedial orders which had been previously approved by the District Court, the Court of Appeals, and as to which this Court declined certiorari, and where that order, as well as the earlier remedial orders, were solely designed to rectify unconstitutional conditions which the District Court found to have existed in the school system?

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RESPONDENTS.

CONCERNED BLACK EDUCATORS OF BOSTON,
INTERVENOR, RESPONDENT.

**In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

Concerned Black Educators of Boston (CBEB), an organization of black teachers permitted to intervene as plaintiffs-intervenors in the above-entitled case, oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit brought by Local 66, Boston Teachers Union, requesting this Court to review the First Circuit's judgment in

*Morgan et al.* v. *O'Bryant, et al.*, (C.A. 1, Nos. 81-1561, 81-1617, 81-1619, and 81-1646; February 17, 1982).

**Statement of the Case.**

Between the years 1974 and 1982, the District Court for the District of Massachusetts entered certain orders designed to remedy violations of the constitutional rights of black parents and their children who attend the Boston Public Schools. In 1974, the District Court found that the Boston Public School authorities had knowingly engaged in a policy of racial discrimination, had intentionally maintained a dual system along racially segregated lines. As part of that finding, the District Court issued certain preliminary orders. *Morgan* v. *Hennigan*, 379 F.Supp. 410 (D. Mass. 1974). The first circuit affirmed both the underlying findings and the preliminary orders. *Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Additional remedial orders were entered in 1975 and affirmed in 1976 in *Morgan* v. *Kerrigan*, 401 F.Supp. 216 (D. Mass. 1975), affirmed, 530 F.2d 401 (1st Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

The District Court had specifically found that one aspect of the intentional segregation of the Boston Public Schools was the "racial composition and distribution of faculty members in the school system." 379 F.Supp. at 456-466; 388 F.Supp. 581-582. Accordingly, the Court ordered that black and white teachers be hired on a one-for-one basis until the percentage of black faculty reached 20% (the percentage of blacks in Boston at the time), and that there be affirmative recruitment until a figure of 25% black faculty was reached. *Morgan* v. *Kerrigan*, 388 F.Supp. 581 (D. Mass. 1975). The First Circuit affirmed this finding, 530 F.2d 431 (1st Cir. 1975) and this Court declined review, 426 U.S. 935 (1976).

These orders were based on the Court's careful analysis of the nature of the constitutional violations of the rights of the black children in this school system, and the lengthy history of the defendants' non-compliance. It was consistent with the findings and rulings of other courts within the federal system and treated as such by the First Circuit Court of Appeals and by this Court.

Indeed, the Court's approach might be characterized as conservative; the statistical record suggests that an even higher goal would have been justified. In 1975, the percentage of black students in the Boston Public Schools was approximately 35%. *Morgan* v. *Kerrigan*, 388 F.Supp. at 582. Preliminary 1980 census figures showed black population of over 22%. The projected percentage of black children in the Boston Public Schools for 1981 was over 46%. Appendix [A] 3n.2.

Moreover, while there had been some changes in the school defendants'* performance, the record as a whole remained a sad one. As recently as 1978, the District Court found that the defendants had intentionally evaded its two-year-old faculty recruitment and hiring orders. With the tacit approval of the petitioner herein, the BTU, the school defendants had hired several hundred more white teachers than black rather than obeying the court's remedial orders.** As a result, the District Court modified its original orders to require that the percentage of black teachers increase annually by at least one and one-half percentage points until the 20% goal was obtained. This

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*The School defendants are the Boston School Committee, as individual members and the Superintendent of the Boston Public Schools.

**The defendants accomplished this by discontinuing the appointment of new permanent teachers and making a disproportionate number of white provisional teachers permanent by re-hiring them, thereby giving them tenure. They then claimed as the BTU does now, that they were unable to effect the desegregation of the school faculty because of the legitimate expectations of tenured white teachers.

order, entered July 5, 1978, was unpublished, and, unlike the earlier orders, was not appealed.

By early 1981, the percentage of black teachers had risen only to 19.08%, and that of black administrators, 20.5%. Even this progress was threatened by a budget crisis as a result of which the school defendants proposed massive layoffs of teachers and administrators. The District Court was asked to implement its earlier orders in a situation in which the work force was contracting rather than expanding, in which there were massive layoffs, rather than hiring opportunities.

On the one hand, the CBEB argued that layoffs should be conducted in such a fashion as to achieve the goal of a 25% black faculty. The only reason that the Court ordered affirmative recruitment to bring the black faculty to 25% (from the 20% achieved through hiring quotas) was the Court's concern that the pool of black applicants would be inadequate to support a 25% goal. That concern was misplaced where layoffs were concerned as the higher goal could easily be achieved from the existing work force.

On the other hand, the petitioner, Boston Teachers Union, proposed — and continues to press for — the abandonment of the effort to desegregate the schools entirely. It has asked that the school defendants conduct layoffs according to strict seniority, even where such a process (given the projected number of layoffs) would eliminate all of the black teachers hired as a result of the lower court's order. If the seniority approach were followed, the percentage of black teachers would be reduced to 8%, in a school system now 46% black. It was a black faculty that was only 5.4% black that ignited the Court's attention in 1974.

The school defendants proposed an intermediate, maintenance approach — conducting layoffs in such a way as to fix the current percentage of black faculty and staff. It was this

approach that the District Court adopted, with some modifications.*

The Court's decision struck a careful balance between the opposing interests. It did so in a fashion wholly consistent with the principles outlined by this Court, and by the lower federal courts. The First Circuit Court of Appeals, once again, affirmed these orders characterizing them as:

> necessary to safeguard the progress toward desegregation painstakingly achieved over the last seven years. Without them, the percentage of blacks would have fallen almost to its level nearly a decade ago, before this suit was brought. Such a result could not be contenanced. . .

Appendix [A] 13.

## Summary of Argument.

The petition for certiorari of the Boston Teachers Union wholly mischaracterizes the Court's 1981 orders, suggesting that they effect a major change in this ten-year-old desegregation case, while at the same time minimizing the impact of the course BTU has urged upon the Court. It suggests that the Court's 1981 order does not meet the standards governing the award of equitable relief in a desegregation case; that it is an unconstitutional racial quota rather than a limited remedial order. To be sure, it is only by suggesting that the 1981 order is dramatically different from the Court's earlier orders that

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* The District Court order also specified that laid off black teachers would have an absolute preference in recall until the 20% goal is reached. The order suspended the defendants' obligation to engage in affirmative recruitment aimed at reaching a goal of 25% black faculty, until all tenured teachers who were laid off had been recalled.

the BTU hopes to escape the logical implications of its failure to appeal the Court's 1978 remedial orders; the implications of the actions of the First Circuit in affirming the orders that were appealed; and the implications of this Court's decision to decline certiorari concerning the earlier orders.

The District Court has done nothing but continue to enforce its earlier orders, which orders were affirmed by the First Circuit Court of Appeals and as to which this Court has consistently declined review. It has carefully followed the mandate of *Milliken* v. *Bradley*, 433 U.S. 267 (1977). The initial orders were designed to remedy specific constitutional violations found by the District Court. The 1981 order was designed to implement those remedial orders and to insure that the progress already made towards a desegregated school system would not be dismantled. Each of the orders was carefully constructed so as to restore the victims of discrimination — namely the school children of Boston — to the positions they would have occupied in the absence of discriminatory conduct. And, they are consistent with the federal court's concern that state and local authorities manage their own affairs consistent with the Constitution. In the instant case, the District Court affirmed the school defendants' maintenance approach.

The District Court has done nothing which is inconsistent with applicable decisions of this Court and of the lower federal courts. In short, none of the criteria for certiorari has been met.

## Reasons for Opposing the Writ.

### I. The Decision Below is Consistent with Settled Principles of Equity Declared by This Court to Govern the Fashioning of Race-Conscious Remedial Decrees.

The orders of the District Court in 1974, 1975, and 1978, formed part of a scheme to secure "make whole" relief for the

plaintiff class of black students and their parents. Such relief was required by this Court's mandate to eliminate the vestiges of segregation "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438 (1968). Furthermore, such relief was completely consistent with the standards for equitable remedies in school desegregation cases set forth by this Court in *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977). In the only other case dealing with this precise issue, the implementation of desegregation orders at the time of massive layoffs, a district court came to the same conclusion: a preference for black teachers in layoffs and recalls is a reasonable and constitutionally permissible solution to the problem. *See, Oliver* v. *Kalamazoo Board of Education*, 498 F.Supp. 732, 750, 755 (W.D. Mich. 1980), appeal pending.

The BTU's arguments are, in reality, directed to the District Court's underlying orders and findings of liability, which orders and findings have been previously scrutinized and sustained by the First Circuit Court of Appeals. They raise arguments which have been explicitly rejected by the First Circuit and which this Court has declined to review. They have argued that the 20% figure is wrongly computed, and in effect, that there is no necessity for the desegregation of black faculty in the first instance because the concerns for "role models" have been misplaced. They have focused upon the impact of the 1981 orders on "innocent" third parties, namely the senior white teachers, an impact which the District Court plainly took into account in 1975, 1976 and 1978.

Next, in order to escape the obvious criticism that they are using this occasion to re-litigate settled remedial questions, they now argue that 1981 orders are not necessary because desegregation has already been achieved in the Boston Public School system, an argument wholly without evidentiary support.*

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* The BTU asserted virtually none of the arguments it now presents on appeal to the District Court during the argument conducted below concerning

### A. *The First Milliken Requirement.*

The District Court's 1981 order meets the first *Milliken* requirement that the remedy be related to the conditions alleged to offend the Constitution. It was designed to carry out the remedial orders which had been entered in 1975, 1976 and 1978. And those remedial orders were directly related to the unconstitutional conditions found by the District Court. The First Circuit has twice upheld the underlying finding of liability, including those relating to faculty and staff segregation and the initial remedial orders concerning the percentage of black faculty. *Morgan* v. *Kerrigan*, 509 F.2d 599 (1st Cir. 1975); 530 F.2d 431 (1st Cir. 1976).

There were findings of pervasive violations of the constitutional rights of black school children in the Boston schools, and particularly violations with respect to the actual composition and distribution of faculty members in the school system. The District Court's 1975, 1976 and 1978 orders were tailored to eradicating that segregated school system, including the segregated faculty and staff. 509 F.2d at 600-601. The 1981 orders did nothing more than "to safeguard the progress towards desegregating the faculty and administrative staff — and thus the progress toward dismantling the dual school system — already made," as the First Circuit found (A. 8).

While the BTU claims to be challenging the District Court's 1981 order, it is, in reality, challenging — far too late — all of the previous findings and orders. It argues that the 20% figure is inappropriately based on the black population of Boston.

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the Court's original order. It spoke only against the need for layoffs, and against CBEB proposals to tailor the layoff procedures so as actually to increase beyond present ratios the percentage of black faculty. It did not argue that the proposed orders effected an unconstitutional discrimination against senior white teachers. It did not make a request for an evidentiary hearing until its motion for reconsideration, some seven weeks after the Court's original order.

It challenges the very predicate of the Court's faculty desegregation orders, claiming that there is no necessity for "role models" for black students, even in a school system that is now 46% black.

The 20% goal was the subject of rigorous analysis by the District Court, and careful review by the First Circuit. Indeed, the First Circuit implied it was a minimal, conservative approach. The use of that figure, rather than the percentage of black students in the system, the Court noted, was "apparently motivated at least in part by a desire to minimize court involvement over a period of time." 530 F.2d at 433.*

In the alternative, the BTU argues that the 1981 orders are beyond the scope of the constitutional violations because desegregation has now been accomplished.

As the First Circuit noted, this argument has no basis in the present record. The BTU never moved for the District Court to withdraw supervision of the Boston School System. Nothing in its moving papers suggested that it was requesting a hearing for the purpose of introducing evidence in support of such a motion. Without proof that Boston's segregated school system has been eliminated, and indeed with proof to the contrary (A. 9, n.5), the District Court had the power to make orders premised on these unconstitutional conditions it found to exist" (A. 9).

### B. *The Second Milliken Factor.*

The BTU claims that the 1981 orders violate the second *Milliken* requirement, that the decree be remedial in nature

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* Many other courts have adopted the "percent of black students" as the appropriate yardstick in formulating faculty desegregation orders. *Keyes* v. *School District No. 1*, 521 F.2d 465, 484 (10th Cir. 1975); *United States* v. *Texas Education Agency*, 467 F.2d 848, 868, 873 (5th Cir. 1972); *Arizona* v. *Waco Independent School District*, 373 F.Supp. 1264, 1270-1271 (W.D. Tex. 1973).

and "it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken* v. *Bradley*, 433 U.S. at 280. It argues that the order benefits black teachers and administrators who were never shown to be the victims of hiring discrimination, and fails to give "appreciable weight" to the incumbent white teachers' interest in not losing their jobs "because of their race." BTU Petition for Writ of Certiorari (hereinafter "petition"), p. 18.

The BTU misperceives the nature of the case. At the outset, the District Court issued certain orders, which the First Circuit sustained, with respect to faculty desegregation because of the interests of the *children*. The victims are not the possible hiring discriminatees, but black school children made to survive in a faculty and staff environment that was overwhelmingly white. *Morgan* v. *Hennigan*, 379 F.Supp. at 456. The 1981 order — like the previous ones — benefit these victims of discrimination.

The fact that the interests of white teachers have been, and will continue to be affected by *any* remedial order making black school children whole, has already been considered and rejected by the First Circuit in its review of the initial orders. *Morgan* v. *Kerrigan*, 530 F.2d at 432 n.2. As the First Circuit noted in its most recent opinion, "once there has been a finding of intentional racial discrimination, race-conscious remedies are a constitutionally valid means of ameliorating the effects of such discrimination" (A. 11). And in a school desegregation case, race-conscious remedies may be required where color blind approaches would be inadequate. *Swann* v. *Charlotte-Mecklinburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968).

In any event, the petitioner, BTU, is not a wholly innocent bystander. In 1978, the District Court had to conduct hearings to investigate the flagrant noncompliance with its two-

year-old one-to-one faculty hiring order brought about through the activities of the school defenders with the tacit approval of the BTU.

Moreover, rather than "innocently" relying on settled principles of seniority, the BTU entered into a collective bargaining agreement expressly subject to the court's orders. The seniority provisions governing layoff and recall in the collective bargaining agreement negotiated by the BTU and the school defendants were expressly subordinated to outstanding court orders. The collective bargaining agreement at issue was entered into after the last faculty desegregation order in 1978, and was made subject to "all applicable state and federal laws and lawful orders pursuant thereto." While it may be true that the expectations of some white teachers have been dashed notwithstanding the language of the collective bargaining agreement, the union must shoulder much of the responsibility for falsely raising these expectations.

As the First Circuit found, the District Court's orders:

> [w]ere a reasonable response to the situation which confronted it, and that, in the circumstances they do not constitute forbidden racial preferences. . . . We understand and sincerely regret the fact that the expectations of certain teachers have been defeated, but the alternative would be to defeat the expectations of the plaintiff class of school children and their parents. The District Court struck a reasonable balance between these competing interests, and we therefore see no reason to disturb it. (A. 14.)

### C. *The Third Milliken Factor.*

The last prong of the *Milliken* test asks the Court to take into account the interests of state and local authorities in managing

their own affairs consistent with the Constitution. 433 U.S. at 280-281. In the instant case, the maintenance approach adopted by the District Court was consistent with the Boston School Committee's own proposal for dealing with the situation. Thus, as the First Circuit noted: "[t]his is not a case where a judicial formulation has been imposed upon a resistant and objecting administrative body" (A. 15).*

D. *Whether an Evidentiary Hearing was Required.*

The BTU now claims that the District Court erred in not holding an evidentiary hearing "for the purpose of fully reviewing the impact on all the parties of the Court's June 2 order." It did not request an evidentiary hearing on the subject of whether or not compliance with the Court's desegregation orders had been achieved. Moreover, the request for an evidentiary hearing was never made until the BTU's motion for reconsideration, some seven weeks after the original order.

In any event, the District Court had all the information it needed to know. It was aware of the impact the layoffs would have on those laid off. It knew the numbers in some detail. All of these factors had been weighed in the balance in years past.

The only question as to which evidence would have to be taken was whether or not the dual school system had been abolished, and thus whether further remedial orders were nec-

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* It should be noted that this factor cuts against the District Court's decision with respect to administrators. As noted in the companion case, school defendants suddenly took a different tack with respect to administrative personnel, although the arguments and issues are identical to those raised by the faculty orders. With respect to administrators, the school defendants ordered layoffs according to "strict seniority." Under those circumstances, the *caveat* in *Milliken* comes into play. Notwithstanding the concerns for local autonomy, if school authorities "fail in their affirmative obligations . . . judicial authority may be invoked." *Milliken* v. *Bradley*, 433 F.2d 280-281.

essary at all. No such evidence was presented, or offered. Nor could it have been. The record before the District Court suggested precisely the opposite (A. 9 n.5).

## II. A District Court's Orders Fit Squarely Within the Constitutionally Permissible Scope of Race-Conscious Remedies.

The BTU argues that there is a "fundamental difference between 'integrating' of faculty — that is, hiring and assigning teachers in a non-discriminatory manner — and single-mindedly insisting on a fixed mathematical ratio of black teachers based on the black population of the locality." Petition, p. 13. Whereas the former may be a permissible remedial order, the latter is an impermissible racial quota.

The law has recognized no such distinction. The court did not order layoffs. It dealt with classic compliance issues — how its goals might be accomplished in a reduction in force situation. The existing orders, which dealt expressly with hiring, were not adequate to protect the original goals. Modification of the Court's prior remedial orders was necessary to prevent their nullification.

The fact that these orders will result in the layoff of white teachers does not alter the situation. As noted above, it is settled law that a Court may enter a remedial order to redress violations of the constitutional rights of school children, even when the order adversely affects contractual or statutory rights of non-minority parties. *Milliken* v. *Bradley*, 433 U.S. 267, 279-281 (1977); *United States* v. *Greenwood Municipal Separate Sch. Dist.*, 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907 (1969); *Oliver* v. *Kalamazoo Board of Education*, *supra*. And the District Court may enter further orders to ensure compliance with its original desegregation orders, again,

notwithstanding the fact that rights of non-minorities are adversely affected. *Brown* v. *Neeb*, 644 F.2d 651 (6th Cir. 1981); *Oliver* v. *Kalamazoo*, *supra*.

The distinction between the content of the orders which is affirmed by the First Circuit in 1975 and 1976 and as to which this Court declined review in the instant orders is semantic. The orders in 1981 are necessary to implement the orders which had been entered in 1974 through 1978. Without the 1981 actions of the District Court, those earlier efforts would have been nullified. As the Court of Appeals noted, that was a result which could not be countenanced (A. 13).

## Conclusion.

For these above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 81-2306

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1981

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LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
*Petitioner,*
v.
BOSTON SCHOOL COMMITTEE, *et al.*,
*Respondents.*

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## REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-230C

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LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

*Petitioner*,

v.

BOSTON SCHOOL COMMITTEE, *et al.*,

*Respondents.*

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## REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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1. Respondents Boston School Committee and Superintendent of Boston Public Schools (hereinafter referred to collectively as "the Boston school authorities") assert that the district court's unappealed order of July 5, 1978, empowered the Boston school authorities to achieve the required proportions of black teachers within the school system by means of laying off senior white teachers while retaining junior black teachers. Boston School Opp. at 5. Proceeding from that premise, these respondents maintain that the clause in the 1980 collective agreement making the agreement "subject to all applicable State and Federal laws and lawful Orders pursuant thereto" had the effect of subordinating the provisions of that agreement requiring that layoffs be made on the basis of seniority to the power of the school authorities under the 1978 order to make layoffs on a racial quota basis. Boston School

Opp. at 5-6. And, on that same premise, these respondents contend also that the district court's June 2, 1981 order, which is the subject of the present litigation, is no more than a "technical modification" of the 1978 order—indeed, a modification that *ameliorates* the effects upon whites of the 1978 order—and thus somehow is unworthy of being addressed on its merits as the court below did. Boston School Opp. at 6.

These contentions of the Boston school authorities fail at the threshold: the 1978 order did not empower the school authorities to achieve the required racial proportions through the use of layoffs based on racial quotas. The 1978 order—which is captioned "Memorandum And Further Orders On Faculty *Recruting And Hiring*" (emphasis supplied)—confers a power to adopt additional steps only with respect to "*recruiting* and *hiring* procedures":

> If recruiting and hiring procedures in addition to those heretofore and herein ordered by the court should become necessary in order to achieve said annual increase, the city defendants shall select and adopt them, without further court order, . . . .[July 5, 1978 Order at 4.] [1]

In a footnote attached to the above-quoted sentence, there is, as the Boston school authorities now stress, a reference to "modifying the excessing policy" in the context of a list of "examples" of possible additional recruiting and hiring procedures. But at most that reference is ambiguous. And, the decisive point is that *no*

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[1] See also the earlier portion of the 1978 order, stating:

> The mandatory annual 1½% increase in the percentage of black teachers in the school system as a whole is a minimum which, on the basis of abundant evidence at the hearings of past and predictable vacancies in teaching positions and taking declining student enrollments into account, we find to be *readily attainable during the next several years without impairing the job security of teachers who are tenured or may be permanently appointed.* [*Id.* at 2, emphasis supplied.]

party to this case understood that reference in the 1978 order as conferring upon the school authorities the power to achieve the required proportions of black teachers by making layoffs based on race. Precisely because the Boston school authorities did not understand the 1978 order to confer such a power, those authorities in February, 1981, faced with the prospect of significant reductions in the teacher-force, stated that "the guidance of the Court is urgently needed," and requested the district court to resolve the conflict between the layoff-seniority provisions of the collective agreement and the requirement of the court's previous orders that blacks comprise a certain proportion of the teacher-force. Thus, in a memorandum to the court filed on February 19, 1981, the Boston school authorities stated:

> The School Department is subject to conflicting obligations insofar as it is simultaneously bound to the collective bargaining agreements and committed, both legally and morally, to the successful desegregation of its teaching and administrative workforces. Only the Court can ultimately resolve this conflict.
>
> • • • •
>
> The one generalization that can be made about the Court's faculty and administrative desegregation orders is that they contemplate desegregation by means of hiring.
>
> • • • •
>
> The School Department might simply try to adhere to outstanding orders as best it can under the circumstances.[3] However, since the current crisis

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[3] Since the teacher desegregation orders focus primarily on *results*—increases in percentages—presumably it [sic] would apply regardless of whether the teaching force is expanding or contracting. *However, those orders do not explicitly authorize departures from the seniority provisions of the collective bargaining agreements, and, as was noted earlier, those orders assume that they will not interfere with the job security of permanent teachers.*

> presents a situation quite different from the one which existed when those orders were entered, the School Defendants believe that those orders should at least be reexamined. Moreover, to the extent that those orders mandate specific increases in the percentages of minorities in any category of employees come what may, the current situation makes compliance with those orders an extremely unlikely prospect. Reexamination of those orders becomes a virtual necessity. [School Defendant's Preliminary Memorandum Regarding Reductions In Force, at 3, 4, 5, emphasis added.]

Thus, the Boston school authorities' contentions in this Court are belied by their own submissions to the district court. (For an accurate statement of the events leading to the 1981 order see the opinion below, App. A-4.)[2]

2. Like the Boston school authorities, the basic approach of the respondents Tallulah Morgan, et al. (the plaintiffs below) is to treat this case as one controlled by the lower court's *hiring* orders, thereby evading the basic question whether a racial hiring quota is the constitutional equivalent of a racial layoff quota. The plaintiffs below do deviate from this approach in one significant respect—they seek to justify the racial layoff quota on the basis of the "role model" theory. Morgan, et al. Opp. at 9-10, n.5. But as detailed at pp. 13-14 of the petition, that theory had been expressly *discredited* in the dis-

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[2] The Boston school authorities advisedly ignore the unfairness of an order that allows the school authorities—the defendants who were found to have violated the Constitution—to make substantial financial savings at the expense of the terminated white teachers. To justify this result, respondent Concerned Black Educators charge the teachers with "tacit approval" of the school authorities discriminatory hiring practices. Educators' Opp. at 3, 11. No evidence is cited as support for this charge and the concept of guilt by "tacit approval" is foreign to the law. Cf. *General Building Contractors Association v. Pennsylvania*, —— U.S. ——, 50 L.W. 4975, 4979-4982 (June 29, 1982).

trict court's original decision. The position of the plaintiffs below *then* was that black school children were disadvantaged by the assignment of relatively inexperienced black teachers to primarily black schools. That position, which the district court accepted, was then, and in our view remains, correct. The felt necessity to contradict their prior position[8] in order to defend the layoff quota order presently on review demonstrates that the layoff order is not, as the plaintiffs below proclaim, a mere extension of the hiring order, but is actually inconsistent therewith *in its effect on Boston school children*, black and white. The failure of the courts below to recognize this inconsistency impeaches their conclusion that the racial layoff quota decreed is equitable—even if as those courts assumed the adversely affected teachers' interests could be disregarded. Plaintiffs argument that "[t]he effect of making layoffs proportionate to the prevailing racial/ethnic percentage within the school system is to equalize the burden of layoffs among the races" (Morgan et al. Opp. at 12) is bad mathematics, worse equity, and we believe, unsound constitutional law.

3. In our petition, we stated that as a result of the district court's order here in question, "over a thousand white teachers with tenure of up to 16 years of service have been laid off while none of the tenured black teachers (including those with lesser service) have been laid off and at the same time new black applicants have been hired." Pet. at 8-9. None of the respondents challenges that statement, which is accurate in every respect. But

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[8] See, e.g., *Scarano v. Central R .Co. of New Jersey*, 203 F.2d 510, 513 (C.A. 3):

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention.

respondent Massachusetts Board of Education (hereinafter "the State Board") quibbles with the next sentence of the petition which begins "[t]he long-term white teachers who carry the entire burden of accommodating to a sharply reduced school budget. . . ." The State Board contends that:

> Under the challenged order, which mandated that the current *percentage* of black teachers be retained, the substantial number of layoffs at issue clearly reached black teachers, albeit less senior black teachers, as well as white teachers. [State Bd. Opp. at 24.]

The facts are these: Over one thousand white permanent (*i.e.* tenured) teachers were laid off pursuant to the district court's order; no permanent black teachers were laid off. With regard to the effect of that order on provisional teachers—the teachers who work on the basis of a one-year contract—in the year following the order, half of the white provisional teachers were terminated (those without special skills), and a third of the black provisional teachers were terminated (those lacking a teaching certificate or other basic qualifications).

4. The State Board contends that the references in our petition to principles established in cases involving employment discrimination decided under Title VII of the Civil Rights Act of 1964 or under the Fourteenth Amendment are "misguided" because this is a school desegregation case "involv[ing] the vindication of the constitutional rights of black school children." State Bd. Opp. at 12. The State Board asserts that "[p]etitioners should more properly address the line of cases which emphasize the relationship between faculty-staff considerations and school desegregation." State Bd. Opp. at 12-13.

None of the decisions cited by the State Board (at p. 13 of its opposition), and indeed no school desegrega-

tion decision of this Court, has addressed the need for or propriety of a requirement that a school system hire or retain a particular proportion of black teachers in its overall workforce. Indeed, no decision of this Court has dealt with any question of hiring or retention based on race in the context of a desegregation order. The cases cited by the State Board deal with a different question: the power of the courts, in the context of fashioning a school desegregation remedy, to order the *reassignment* of teachers as between schools within a school system to eliminate racial imbalance in the assignment of already employed teachers.[4]

Thus, this Court has never addressed, much less resolved, the issues posed by this case. This Court has never determined whether and to what extent the principles applicable in employment discrimination cases generally may be applicable in the context of a school desegregation order. Indeed, this Court has never determined whether and to what extent there may be any resort to racial preferences in hiring or in making discharges in the public sector. That void in the constitutional law is itself a compelling ground for granting the petition here.

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[4] Where racial discrimination in teacher assignments has been part of an overall system of segregated schools, it has been necessary to reassign teachers as part of a general plan to eliminate so far as possible the racial identity of particular schools. See *Rogers v. Paul*, 382 U.S. 198, 200; *Bradley v. School Board of City of Richmond*, 382 U.S. 103, 105; *United States v. Montgomery County Board of Education*, 395 U.S. 225, 232, 236; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18, 19-20; see also *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 196; *Columbus Board of Education v. Penick*, 443 U.S. 449, 453, 455; *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535, 539.

## CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO
Petitioner,
v.
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Respondents,

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 81-2306

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, ET AL
Respondents,

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Federation of Teachers, AFL-CIO (hereinafter referred to as "AFT") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The AFT has sought the consent of the respondents' attorneys to the filing of this brief. The consent of all the parties has been obtained except Concerned Black Educators of Boston, which has not responded to our request, and Tallulah Morgan, et al., who rejects our request.

The AFT is an AFL-CIO union made up primarily of elementary and secondary teachers, college and university professors and other non-supervisory personnel in the field of education. It was founded in 1916 and now represents over half a million members organized in over 2,000 locals in this country and abroad. Included in its membership are teachers of both sexes and all races.

As an exclusive bargaining representative for teachers, the AFT and its locals regularly negotiate and administer collective bargaining agreements which contain seniority-based layoff and recall provisions. As a trade union of educators, the AFT actively supports school and faculty desegregation, affirmative action programs, and equal employment opportunities.

Pursuant to the overwhelming mandate of delegates to AFT National Convention in July 1982, the AFT moves to join and support its affiliate, Local 66, Boston Teachers Union, AFT, AFL-CIO, in its effort to secure certiorari of the decision of the First Circuit Court of Appeals in *Morgan, et al, v O'Bryant, et al* (C.A. 1, Nos. 81-1561, 81-1617-1619 and 81-1646; Feb. 17, 1982).

Our participation will provide the Court with the perspective of a national labor union of teachers that is committed to collective bargaining, the defense of seniority, and the preservation of quality education.

Respectfully submitted,

Bruce A. Miller
*Attorney for Amicus Curiae*
*American Federation of Teachers,*
*AFL-CIO*

No. 81-2306

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO
Petitioner,
v.
BOSTON SCHOOL COMMITTEE, ET AL
Respondents,

## BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## QUESTION PRESENTED

The American Federation of Teachers adopts the Statement of Question Presented and the Petition of Local 66, Boston Teachers Union, AFT, AFL-CIO for the reasons set forth below under the heading "Interest of the American Federation of Teachers, AFL-CIO and Reasons for Granting the Writ."

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## INTEREST OF AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND REASONS FOR GRANTING THE WRIT

The American Federation of Teachers, AFL-CIO, (hereinafter referred to as "AFT") is an international labor organization representing some 571,600 members and their families. Approximately 450,000 members are teachers covered by collective bargaining agreements. Included in its membership are teachers of both sexes and all races. As exclusive bargaining representatives for teachers, its locals regularly negotiate and administer collective bargaining agreements which contain seniority-based lay-off and recall provisions. As a trade union of educators, the AFT actively supports school and faculty desegregation, affirmative action programs, and equal employment opportunities.

The AFT has actively supported the abolition of legal barriers to school and staff integration. The AFT fought faculty segregation by ousting its southern local that maintained segregated membership. Open enrollment, free tuition plans, career ladder programs that enable paraprofessionals to become teachers, and integrated teacher recruitment drives in the South and Puerto Rico were early strategies of the AFT. In many cases these strategies were made part of the collective bargaining agreement. Indeed, the AFT's historical commitment to the principle of equal educational opportunity has served as the philosophical foundation for both its collective bargaining and extensive legislative efforts.

The AFT has supported and encouraged the inclusion of black and other minority group history courses into the required curriculum for all future teachers. The

union has condemned the discriminatory treatment of minorities in textual materials used in education systems and it has requested that local school boards employ textbooks which avoid such discriminatory treatment.

Beyond education, the AFT has been at the forefront in the struggle to eliminate segregation and discrimination in housing, job opportunities and public and private institutions.

Since the 1920's the AFT has refused to hold its annual convention in any city or hotel that did not provide equal treatment for blacks and whites. And, in 1934, the AFT moved its convention from one hotel to another when its black delegates were not accorded equal treatment.

Throughout its history, the AFT has fought many pioneering battles to improve education and the welfare of teachers. Some of its most difficult struggles occurred over the issues of tenure and economic security. The AFT has learned that seniority is the cornerstone of collective bargaining. Seniority guarantees fairness of treatment through the application of racially neutral criteria. It prevents divisiveness among working people by distributing scarcity through a system that is objectively fair. Seniority denies employers the right to use invidious and subjective methods of distributing benefits — methods that pit worker against worker, thereby weakening them and strengthening their adversary. This *Amicus* joins its fellow teachers of the Boston Teachers Union in their Petition because the AFT believes that the decision of the court below will have serious destabilizing effects on collective bargaining and an adverse effect on the education of Boston school children.

The AFT believes this case is of national significance. The questions *sub judice* are at issue in at least two other school desegretation cases on appeal to the Sixth and Seventh Circuits.[1]

The AFT believes that the remedy approved below undermines the original intent of the court in entering its desegregation order. A purpose of that order was to improve the quality of education for students who had been disadvantaged. The relief approved below results in the retention of less experienced, less educated and presumably less qualified teachers. They are substituted for experienced, more educated and presumably better qualified teachers. The relationship of experience to quality education was recognized by the District Court when it noted that "in any calling, experienced practitioners are ordinarily more effective[.]" *Morgan v. Hennigan*, 379 F. Supp. 410, 462 (D. Mass. 1974), *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (C.A. 1, 1974), *cert. denied*, 421 U.S. 963 (1975).

The remedy provided in this case raises significant questions of collective bargaining and educational policy that should be reviewed by this Court.

## CONCLUSION

For the foregoing reasons, the AFT asks this Court to review the decision below.

Respectfully submitted,

Bruce A. Miller
*Attorney for Amicus Curiae*
*American Federation of Teachers, AFL-CIO*

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[1] *Oliver v. Kalamazoo Board of Education*, 498 F. Supp. 732 (W.D. Mich. 1980), *appeal docketed*, Nos. 81-1770 and 81-1741 (C.A. 6, Dec. 11, 1981); *McPherson v. School District No. 186, Springfield, Illinois*, No. S-CIV-74-44 (C.D. Ill. 1981) (unpublished Order), *appeal docketed*, No. 81-1193 (C.A. 7, Feb. 10, 1982).

In The

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OCTOBER TERM, 1973

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LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

Petitioner,

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Respondents.

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE A. PHILIP RANDOLPH INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the

# Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO
*Petitioner,*

v.

BOSTON SCHOOL COMMITTEE, ET AL.,
*Respondents.*

Case No. 81-2306

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The A. Philip Randolph Institute ("APRI") respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorney for the Petitioner has been obtained. The consent for the attorneys for respondents, Boston School Committee, Massachusetts Board and Commissioner of Education and El Comite de Padres has also been obtained. Consent of the attorney for Respondent, Talulah Morgan, *et al.* was requested but refused. As of this date, the attorney for Respondents, Concerned Black Educators of Boston has failed to respond to our request for consent.

The APRI is a national organization of black trade unionists and others committed to the principles espoused by A. Philip Randolph, America's foremost Black labor leader. These principles include commitments to racial integration and the principles of unionism.

Since 1965 the APRI, through more than 180 local affiliates throughout the country, has worked to advance the social and economic interests of black Americans by supporting and sponsoring education and training, advancing voter registration, trade union activities and law reform.

The APRI moves to participate in this matter as *Amicus*

*Curiae* to address the issues raised in the petition of the Boston Teachers Union from the APRI's unique perspective. This perspective opposes mechanisms which, although well-intended, abrogate the seniority principle, create new victims of race discrimination, and pit worker against worker on the basis of race.

The APRI participated as *Amicus Curiae* in the United States Court of Appeals for the First Circuit.

WHEREFORE, APRI respectfully moves this Court for leave to file the brief *Amicus Curiae* attached hereto.

Respectfully submitted,

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## Question Presented

Whether a federal district court can invalidate a bona fide, collectively-bargained seniority system, resulting in the discharge of innocent white teachers while preserving the employment of less senior black teachers and permitting the employment of new black teachers with no seniority, though none of these black teachers is a discrimination victim, in order to preserve a racial balance among the faculty in a school desegregation case?

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**Miscellaneous:**


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In The

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OCTOBER TERM, 1981

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Local 66, Boston Teachers Union,
AFT, AFL-CIO,

*Petitioner,*

—v.—

Boston School Committee, et al.,

*Respondents.*

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## BRIEF *AMICUS CURIAE* OF THE A. PHILIP RANDOLPH INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The A. Philip Randolph Institute ("APRI"), upon the motion for leave to file as *Amicus Curiae*,* respectfully submits this brief *Amicus Curiae* in support of the Petition for Writ of Certiorari filed by Local 66, Boston Teachers Union, AFT, AFL-CIO.

### Interest of *Amicus Curiae*

The A. Philip Randolph Institute is a national organization of black trade unionists and others committed to the principles espoused by A. Philip Randolph, America's foremost black labor leader. These principles, in brief, include:

1. A commitment to political democracy for all people, whether in the United States or abroad.
2. A commitment to the principles of unionism.
3. A commitment to racial integration.

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*The consents as noted in the motion for leave to file as *Amicus Curiae* have been filed with the Clerk of the Court.

The A. Philip Randolph Institute has a national reputation as a vital and creative force within the black community, and an organization of the utmost integrity. The Institute, through more than 180 local affiliates throughout the United States, works to advance the social and economic interests of black Americans. The Institute supports and sponsors education and training, voter registration and programs to increase black political participation, trade union activity, and other activity consistent with its commitment to social equality.

The A. Philip Randolph Institute participates as *Amicus Curiae* in support of the Boston Teachers Union in this Court, as it did in the Court of Appeals for the First Circuit, because of the Institute's commitment to social equality. The Institute is vitally interested in safeguarding the equitable principle of seniority which treats workers on a fair and rational basis, not related to race, religion, creed or sex. The Institute opposes mechanisms which, though well-intended, abrogate the seniority principle, create new innocent victims of race discrimination, and pit worker against worker on the basis of race. Such a mechanism was approved by the Court of Appeals for the First Circuit.

Accordingly, the A. Philip Randolph Institute offers this Court its perspective and submits this brief *Amicus Curiae* in support of the Boston Teachers Union's Petition for Writ of Certiorari.

## Statement of the Case

On June 2, 1981, Judge Garrity of the United States District Court for the District of Massachusetts ordered, on the motion of the Boston School Committee, that (a) Boston teachers be laid off from their employment "in such a way that the system-wide percentage of black teachers will remain at the current level of 10.09%, and the system-wide percentage of other minority teachers will remain at its current level", (b) "[b]lacks will receive an absolute preference for recall until a 20% figure is reached system-wide . . ." and (c) "[o]nce this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled

or recruited will be black." Conditional Order Modifying Faculty Desegregation Orders. (Petitioner's Appendix A-18).

Judge Garrity's order permitted the Boston School Committee to breach the job security and seniority provisions in the collective bargaining agreement between the School Commitee and the Boston Teachers Union.* It permitted the School Commitee to discharge innocent white teachers, to perserve the jobs of less senior black teachers, and to recruit new black teachers with no seniority while senior white teachers remain unemployed.

The Court of Appeals for the First Circuit approved Judge Garrity's order. *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1982); Petitioner's Appendix A-2. The First Circuit justified the invalidation of the seniority system and the discharge of senior white teachers as necessary to provide relief to black Boston school children by maintaining the percentage of black teachers at 20% and by providing black adult role models.

Judge Garrity permitted no evidentiary hearing in the District Court and the Court of Appeals had no factual record to review.

The A. Philip Randolph Institute believes that the invalidation of a bona fide, collectively bargained seniority system and the discharge of senior white teachers ordered by the District Court and approved by the First Circuit is inequitable, unlawful, unsupported by a factual basis, and inconsistent with the interests of the black community as well as the interests of all Americans.

## Reasons for Granting the Writ

At the outset, it is useful to consider what this case is not.

It is not a case of employment discrimination. It is not a case in which individual victims of race discrimination are seeking a

*Contract between the Boston Teachers Union, Local 66, AFT, AFL-CIO and the School Committee of the City of Boston, Art. IVA §5 and Art. IVC §§16, 17; Petitioner's Appendix A-31.

remedy. There are no identifiable employment discrimination victims to be made whole.

Where individual black and minority workers are discrimination victims, it is just to advance them to their rightful places. It is appropriate to adjust their seniority to where it would have been but for the discrimination against them. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). This is not such a case.

This is a case in which black and minority workers have been given preferential job security. They have been given job security not on the basis of earned seniority but on the basis of race. Though they have not been wronged, they have been given preferential job security at substantial cost.

This cost includes the abrogation of the seniority principles and the undermining of the representative of all Boston teachers, the Boston Teachers Union. It includes the loss of livelihood of hundreds of Boston teachers, innocent of wrongdoing, who are denied job security because they are white.

Preferential job security may be of some benefit to black school children, though the benefit to them is assumed by the courts below, not defined or supported by any evidence. It may be of short-range personal benefit to those black and minority teachers who retain their jobs out of seniority order. It will be of long-range detriment, however, to all blacks and to the cause of social equality. It is detrimental because it undermines unions, compromises the concept of equality embodied in the seniority principle, and puts worker against worker on the basis of race.

Blacks have a significant interest in the strength and viability of labor unions such as the Boston Teachers Union. Unions are the most integrated institutions in American society. The union movement fought harder, longer and more effectively than any other institution to improve job opportunities for minority workers. Through unions, black workers were initially integrated

into American economic and political life and the labor movement has been one of the oldest and staunchest allies in the struggle for civil rights. In the words of A. Philip Randolph:

> In concert with their fellow workers, Black people can take decisive control of their own destinies; with a union, they can approach their employers as proud and upright equals, not as trembling and bowing slaves. Indeed, a solid union contract is, in a very real sense, another Emancipation Proclamation.

The late Dr. Martin Luther King, Jr., addressing the 1961 AFL-CIO Convention, remarked on the unity of interests shared by blacks and the labor movement:

> Negroes are almost entirely a working people . . . Our needs are identical with labor's needs—decent wages, fair working conditions, livable housing, old-age security, health and welfare measures, conditions in which families can grow, have education for their children and respect in the community.

Quoted in B. Rustin, "The Blacks and the Unions", 242 *Harper's Magazine* 75 (May, 1971).

Dr. King's words are as true today as they were twenty years ago. An essential need shared today as then by all workers, black and white, is adherence to the seniority principle.

Seniority is a fundamental principle of the labor movement. A. Philip Randolph Institute Chairman Bayard Rustin and President Norman Hill have written:

> Seniority is an equitable principle; it treats workers on a fair and rational basis not related to race, religion, creed or sex. But it is more than this. It is a just and humanitarian principle accepted overwhelmingly by the American people.

B. Rustin & N. Hill, *Seniority and Racial Progress*, (A. Philip Randolph Institute, 1976).

The seniority principle, obtained through collective bargaining, has been the most effective mechanism in the struggle for equal opportunity for black and minority workers. Through union contracts with the force of law, the seniority principle has served well the rights of black and minority workers. To black workers, as to all workers, seniority is "of overriding importance." *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964).

The District Court order abrogates the seniority and job security provisions in the collective bargaining agreement negotiated on behalf of all Boston teachers. In doing so, the order undermines the strength and effectiveness of the Union and tragically compromises the concept of equality embodied in the seniority principle. Both effects are contrary to the interests of blacks.

It is no exaggeration to assert that the advances and setbacks of black workers are, in large measure, reflective of the victories and defeats of the trade union movement. Court sanctioned abrogation of the seniority principle is a tragic defeat.

In abrogation the seniority and job security provisions in the collective bargaining agreement, the order requires the discharge of white teachers who have not engaged in any discriminatory action, in favor of less senior black teachers who are not identifiable victims of discrimination. In doing so, the order creates a new set of victims of discrimination.

The moral force of the movement for social equality is diluted when the victims become the victimizers. Those who have known racism and exploitation have an obligation to avoid perpetrating these evils against others.

The fruit of the order is bitter. Abrogation of the seniority principle and court-sanctioned racial preference at the expense of innocent white teachers creates a racial wedge between workers. The order, intended to foster integration, has the opposite effect. Rustin and Hill have written:

> [W]e want to emphasize that the reaction of white workers to the loss of seniority would not be racial. What whites

> would object to is not a black getting a job, but losing their own. Of course, their frustrations at what they would see as a monumental injustice would be expressed in racial terms.
>
> But whites with seniority would react just as violently if these taking their jobs were some other ethnic group or if the beneficiaries were younger whites.
>
> * * * * *
>
> The argument over seniority only appears to divide workers along racial lines. The real division is between those who have more and those who have less seniority. In fact, it is conceivable that situations will arise where blacks are asked to give up the protection of accumulated seniority in order to protect some other group. There is a relatively simple way for blacks to understand why whites oppose breaking seniority rights. Ask black men with four years seniority if they will give up their jobs for women with two years seniority, for black women with two years seniority. We have frequently asked such questions and have, thus far, found no one who accepts such a principle. Whites oppose giving up their jobs to insure a certain percentage of black workers for precisely the same reasons that black men resist giving up their jobs to insure a certain percentage of women workers.

*Seniority and Racial Progress, supra,* at 4-5.

Racial division is an inevitable cost of the order. It fuels anti-black political movements and results in the withdrawal of white political and economic support for social and political programs that require legislative action to further the black cause. The racial character that attaches to controversy over preferential job security presents the opportunity for the worst sort of racial demagogues to further separate whites and blacks. The order can no more be justified politically than it can legally or morally.

The order is doubtless a well-intended effort to foster school desegregation. That it is well-intended makes it all the more

tragic that it is misguided. The order trades of the significant long term interests of all blacks in a strong labor movement. It undermines the humanitarian principle of seniority. It contributes to racial division by sanctioning the creation of new victims of race discrimination. It does these things to gain a short term personal benefit for a few interested persons and to satisfy a numerical formula.

School desegregation is a noble end that cannot be accomplished by ignoble means. The order is morally and legally unjustified and contrary to the interests of blacks and of all Americans.

## CONCLUSION

Whether a federal district court can invalidate a bona fide, collectively-bargained seniority system, resulting in the discharge of innocent white teachers while preserving the employment of less senior black teachers and permitting the employment of new black teachers with no seniority, though none of these black teachers is a discrimination victim, in order to preserve racial balance among the faculty in a school desegregation case? This is the important legal question presented. Whether one court's notion of appropriate racial balance justifies violation of the seniority principle and the creation of new victims of race discrimination is a social and moral question as well.

The A. Philip Randolph Institute urges this Court to grant the Boston Teachers Union's Petition for Writ of Certiorari and to address these important questions of law and social justice.

Respectfully submitted,

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MOTION FILED

JUL 16 1982

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LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,
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BOSTON SCHOOL COMMITTEE, ET AL.
*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF *AMICUS CURIAE* OF UNIVERSITY CENTERS FOR RATIONAL ALTERNATIVES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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(1981)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 66, BOSTON TEACHERS UNION, AFT, AFL-CIO,

*Petitioner,*

v.

*Case No. 81-2306*

BOSTON SCHOOL COMMITTEE, ET AL.

*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

University Centers for Rational Alternatives, Inc., ("UCRA") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondents Boston School Committee, Massachusetts Board and Commissioner of Education, and El Comite des Padres has also been obtained. Consent of the attorney for respondent Tallulah Morgan, et al., was requested but refused. As of this date the attorney for respondent Concerned Black Educators of Boston has failed to respond to our request for consent.

UCRA is an organization of faculty members at public colleges and universities throughout the United States. Its members are joined in commitment to strengthening academic freedom, rational discourse as the best method of education, and individual rights.

UCRA and its affiliate Committee on Academic Non-discrimination and Integrity ("CANI"), through their extended aca-

demic networks of members, have gathered information, analyzed trends, formulated positions, and provided factual materials to numerous government agencies and officials in the pursuit of abolishing discrimination.

In this pursuit the UCRA moves to join the Boston Teachers Union in addressing the issues of individual rights, quality of education and academic freedom from the position that all forms of discrimination are Constitutionally impermissible.

This unique perspective will assist the Court in its assessment of the positions of all parties involved.

Respectfully Submitted,

By: _____

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## QUESTION PRESENTED

Whether it is constitutional and equitable for a United States District Court to make an effort to remedy public school segregation by preserving a numerical racial balance in the faculty solely at the expense of the jobs of individual tenured white teachers?

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## BRIEF *AMICUS CURIAE* OF UNIVERSITY CENTERS FOR RATIONAL ALTERNATIVES, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The University Centers for Rational Alternatives, Inc. ("UCRA") respectfully submits this brief *Amicus Curiae* in support of the Petition for Writ of Certiorari submitted to this Court by Local 66, Boston Teachers Union, AFT, AFL-CIO, requesting this Court to review the judgment of the United States Court of Appeals for the First Circuit in *Morgan v O'Bryant*, 671 F. 2d 23 (1st Cir., 1982).

## INTEREST OF *AMICUS CURIAE*

University Centers for Rational Alternatives Inc. ("UCRA") is an organization of scholars and teachers, faculty members at public and private colleges and universities throughout the United States. A list of UCRA's directors and a partial list of sponsors and members is appended to this brief.

Formed in 1968, UCRA brings together professionals from all disciplines, men and women, black and white, renowned scholars and young teachers entering academic life. They are joined in commitment to rational principles in education and academic freedom.

UCRA, and its affiliate Committee on Academic Nondiscrimination and Integrity ("CANI") stand against racial discrimination. In particular, UCRA and CANI oppose the use of race as a criterion to exclude otherwise qualified individuals from employment and academic position. Representatives of UCRA and CANI have opposed disabilities imposed on individuals on the basis of race in presentations to numerous government agencies and officials, in testimony before Congress, and in *amicus curiae* briefs in such cases as *University of California Regents v Bakke*, 438 U.S. 265 (1978) and *Steelworkers v Weber*, 443 U.S. 193 (1979). UCRA and CANI actively oppose what they view as an erosion of constitutionally guaranteed individual rights, including the right to be free from discrimination based on race or ethnicity or sex.

UCRA joins the Petitioner, Boston Teachers Union, in requesting the Court's review of the instant case in keeping with its committments to education, academic freedom, and individual rights.

## STATEMENT OF THE CASE

In 1974, the United States District Court found that Boston public school authorities had knowingly engaged in a policy of racial discrimination and intentionally maintained a dual school

system along racially segregated lines.[1] Among its findings, the District Court determined that school authorities had maintained a dual school system through faculty hiring and assignment policies.[2]

In 1975 the District Court ordered that black and white teachers be hired on a one for one basis until the percentage of black faculty reached 20% and that affirmative recruitment continue until black faculty reached 25%.[3]

In 1978, the District Court found that school authorities had not complied adequately with the hiring quota. The District Court modified the quota, requiring a 1.5% annual increase in black faculty until the 20% quota was attained.[4]

The District Court orders prescribing hiring and recruitment quotas did not contemplate reduction in the Boston teacher force.[5]

In May 1981, the Boston School Committee represented to the District Court that layoffs were necessary and requested approval for layoffs by race to preserve the racial balance attained through seven years of hiring by race. On June 2, 1982 the District Court granted the School Committee's request. The District Court ordered that teacher layoffs "be performed in such a way that the system wide percentage of black teachers will remain at the current level of 19.09%," that "Blacks will receive an absolute preference for recall until a 20% figure is

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[1] *Morgan v. Hennigan*, 379 F. Supp. 410, (D. Mass. 1974); *aff'd sub nom. Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974); *cert. denied*, 421 U.S. 963 (1975).

[2] *Morgan v. Hennigan*, 379 F. Supp. at 456–466.

[3] *Morgan v. Kerrigan*, 388 F. Supp. 581 (D. Mass. 1975); *aff'd* 530 F.2d 431 (1st Cir. 1975); *cert. denied*, 426 U.S. 935 (1976).

[4] *Morgan v. McDonough*, unpublished Order on Faculty Recruiting and Hiring (D. Mass., July 5, 1978); Court of Appeals Appendix of Intervenor-Appellant G.

[5] *Morgan v. McDonough*, unpublished Order Regarding Faculty at South Boston High School (D. Mass., August 21, 1981); Court of Appeals Appendix Intervenor-Appellant M. Also, statement of Dist. Ct., transcript of proceeding, May 28, 1981 at 69–70, Court of Appeals Supp. Appendix of Intervenor-Appellant.

reached," and that "once this 20% figure is reached, no fewer than 20% of the teachers subsequently recalled or recruited will be black."[6]

This order resulted in the dismissal of hundreds of tenured white teachers. New black teachers have been employed to maintain the 20% quota while hundreds of experienced tenured white teachers with as many as 19 years of service remain out of work with no hope of recall. No tenured black teachers have lost their jobs.

The United States Court of Appeals for the First Circuit approved the District Court's order, holding that the layoff of tenured white teachers by race did not "unnecessarily trammel" their rights. *Morgan v O'Bryant*, 671 F.2d 23, 28 (1st Cir. 1982).

The Court of Appeals justified the District Court's order as necessary to preserve a "racially balanced" faculty and to provide black adult "role models" for the benefit of black school children. 671 F.2d at 27; Petitioner's Appendix A-11.

UCRA believes that the Court of Appeals is in error. The approval of a quota mandating layoffs by race does indeed unnecessarily trammel the rights of individual teachers to be free of race discrimination in employment.

## REASONS FOR GRANTING THE WRIT

The central question before this Court is whether a judicial effort to remedy public school segregation may be at the expense of the jobs of innocent individuals.

It is not questioned that the courts below had broad and flexible powers to address segregation in Boston public schools. But that power is not unlimited. It must be measured against traditional principles of equity. *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). A court-ordered remedy must be characterized by "basic fairness," *Swann*, 402 U.S. at

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[6] Conditional Order Modifying Faculty Desegregation Orders (June 2, 1981), Petitioner's Appendix A-18.

31, display "facility for adjusting and reconciling public and private needs," *Brown v Board of Education*, 349 U.S. 294, 300 (1955), and achieve "a balancing of the individual and collective interests," *Milliken v Bradley*, 418 U.S. 717, 738 (1974).

And a court-ordered remedy must preserve the constitutional and statutory rights of innocent individuals to be free of discrimination based on an immutable group characteristic—race. U.S. Const. AM V, XIV; 42 USC §§1981, 1983, 2000e.

The "remedy" ordered by the District Court and approved by the Court of Appeals fails to meet these standards. It unjustly and inequitably imposes the burden of rectifying the wrongdoing of the school authorities on a limited group of tenured teachers. It unconstitutionally deprives these individuals of their profession on the basis of race.

A. No school desegregation decision by this Court or any other United States Court of Appeals approves a "remedy" that results in the layoff of innocent teachers by race. There is no precedent for the decision below. To the contrary, it is in conflict with decisions of this Court in employment discrimination cases. In these cases, this Court set limits on remedies which adversely affect innocents.

In *Steelworkers v Weber*, 443 U.S. 193 (1979), this Court approved a voluntary affirmative action plan which did not "unnecessarily trammel the interests of white employees" because "it [did] not result in the discharge of white workers and their replacement with new black hirees". 443 U.S. at 208. The plan in *Weber* was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." 443 U.S. at 208.

In contrast, the "remedy" in the instant case does result in the discharge of innocent workers by race and the replacement of some by new hirees. And its objective is to preserve a "racially balanced" faculty.

A remedy which adversely affects the interests of innocent workers is tolerable only where necessary to "make whole"

individuals who are identifiable victims of employment discrimination and where there is no "unusual adverse impact" on the innocent workers. *Franks v Bowman Transportation Co.*, 424 U.S. 747 (1976); *International Brotherhood of Teamsters v U.S.*, 431 U.S. 324 (1977).[7]

The Court of Appeals does not seek to justify the racial quota as necessary to make whole identifiable employment discrimination victims. It acknowledges there are none. Still, it approves "drastic relief" at the expense of innocents.

Even where a burden on innocents is justified by the necessity to make whole identifiable victims, traditional equitable principles require a balanced remedy. In *Franks*, the burden of rectifying the employer's wrongdoing is "divided among discriminatee and non-discriminatee employees." 424 U.S. at 777.

Here the burden is not divided. The laid-off white teachers bear the entire burden. These individuals must stand aside, relinquishing their jobs to less senior black teachers and to new hirees "off the street." The black teachers, retained out of seniority order or newly hired, bear none of the burden of the relief; rather they are windfall beneficiaries. The wrongdoer School Committee bears none of the burden. It escapes its contractual obligations and gains a significant financial benefit by gaining court sanction for replacing senior, experienced teachers at the top of the pay scale with teachers who are less experienced and thus lower paid. Here there is no balancing; there is no division. White teachers, innocent of wrongdoing,

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[7] In *Franks*, the majority stated that retroactive competitive seniority relief may not be denied "on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from the facts and circumstances that would not be generally found in Title VII cases." 424 U.S. at 779, n. 41.

Mr. Justice Powell, concurring in part, dissenting in part, joined by Chief Justice Burger and Mr. Justice Rehnquist, characterized retroactive competitive seniority as "drastic relief" which fails to deter wrongdoing employers and which is granted "at the expense of other workers" who are "innocent third parties." *Franks*, 424 U.S. at 787, 789 (Powell, J.). Chief Justice Burger observed that such "relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning." *Franks*, 424 U.S. at 780–81 (Burger, C.J.).

bear the entire burden of the District Court's "remedy" because of their race.

B. The Court of Appeals justifies the District Court's "remedy" as necessary to provide a "racially balanced" faculty and black adult "role models" for the benefit of black students. Not only is this rationale without legal or scientific foundation, it works to the detriment of all Boston school children, black and white.

There is no constitutional right to attend a racially balanced school, to be instructed by a racially balanced faculty or to be taught by racial "role models." *See Swann*, 402 U.S. at 23–25; *Pasadena City Board of Education v Spangler*, 427 U.S. 424, 433–435 (1976).

Nor is there any scientific basis for the need for racial role models in any particular proportion. Indeed, carried to its logical end, the role model theory would justify resegregation of public schools where students may be taught properly only by teachers of their own race. Or sex. Or religion. Or ethnic group.

All school children need teachers who are efficient, sensitive, professionally competent and experienced. School children need teachers who are able to practice their profession in a fair and reasonable work environment, teachers who enjoy the minimal job security and academic freedom provided by a contractual seniority system.

School children do not need teacher insecurity caused by the abrogation of the objective seniority criterion. This infringement upon the freedom to teach erodes the educational environment in public schools.

School children do not need this graphic depiction of Orwellian logic: the way to eradicate race discrimination against black persons is to engage in race discrimination against white persons. Professor Carl Cohen summarized:

> Racial classifications have insidious long-term results: anger and envy flowing from rewards or penalties based on race; solidification of racial barriers and the

> encouragement of racial separatism; inappropriate entry of race into unrelated intellectual or economic matters; the indirect support of condescension and invidious judgments among ethnic groups—in sum, the promotion of all the conditions that produce racial *dis*harmony and racial *dis*integration.

C. Cohen, "Why Racial Preference is Illegal and Immoral"—67 *Commentary* 40, 47 (June 1979).

There is no doubt that many persons have been cruelly deprived of educational opportunity because they are black. The Court of Appeals' adherence to a numerical racial quota, however, has no legal or moral justification when it equally cruelly deprives innocent teachers of employment because they are white.

The role model needed is one who speaks against uncritical acceptance of quotas and simplistic numerical solutions to complex human problems.

> Statistical categories and historic labels may seem real to those inspired by words, but only living flesh-and-blood people can feel joy or pain. Neither the sins nor the sufferings of those now dead are within our power to change. Being honest and honorable with the people living in our own time is more than enough moral challenge, without indulging in illusions about rewriting moral history with numbers and categories.

T. Sowell, "Are Quotas Good For Blacks?" 65 *Commentary* 39, 42 (June 1978).

C. Whether well-intentioned efforts to remedy school segregation justifies preservation of racial balance wholly at the expense of innocent teachers' employment is an issue never addressed by this Court. The Court of Appeals below recognized it as an issue never addressed by any other appellate court, 671 F.2d at 29, Petitioner's Appendix A-13, and an issue of "importance . . . and . . . human impact." 671 F.2d at 26, Petitioner's Appendix A-7.

This question is of importance and immediate significance to the layed off tenured white Boston teachers and thousands of teachers in hundreds of school districts across the country threatened by diminishing enrollment and financial crisis.

The question presented is also of significance to all Americans concerned about equity, the eradication of race discrimination, and the rights of the individual. The racial quota ordered by the District Court and approved by the Court of Appeals, to borrow from Professor Alexander Bickel, *The Morality of Consent*, (1975) 133, is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society."

It warrants review by this Court.

## CONCLUSION

For the foregoing reasons, University Centers for Rational Alternatives, Inc. asks this Court to review the decision below.

Respectfully submitted,

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